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In the Supreme Court of the United States

CITY OF SACRAMENTO AND MIKE KASHIWAGI, DIRECTOR OF THE DEPARTMENT OF PUBLIC WORKS OF THE CITY OF SACRAMENTO, IN HIS OFFICIAL CAPACITY,

Petitioners,

v.

JOAN BARDEN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a), provides, among other things, that "[n]o otherwise qualified person with a disability * * * shall, solely by reason of her or his disability, be excluded from the participation in," or "denied the benefits of," or "subjected to discrimination under," any "program or activity" that "receiv[es] Federal financial assistance" (including such programs or activities of state or local governments). Section 202 of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132, in virtually identical terms prohibits disability-based discrimination in the "services, programs, or activities" of state and local governments and other public entities (and does so without regard to whether the public entity receives any federal funding). The question presented in this case is:

Whether a City's sidewalks – or other forms of physical infrastructure owned by state or municipal governments – constitute an "activity," "program," or "service" of a public entity within the meaning of Section 504 of the Rehabilitation Act or Section 202 of the ADA.

RULE 14.1(b) STATEMENT

Other than those named in the caption, the parties in the court of appeals were respondents Susan Barnhill, Jeffrey Evans, Tony Martinez, Brenda Pickern, Jeff Thom, Suzanne Fitts Valters, and Mitch Watkins, who are named representatives of the plaintiff class certified by the district court of "all persons with mobility and/or vision disabilities who seek full and equal access pertaining to curb cuts and sidewalks in the City of Sacramento's public rights of way."

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-8a) is reported at 292 F.3d 1073. The district court's order granting petitioners' partial motion for summary judgment and certifying the order for permissive interlocutory appeal under 28 U.S.C. § 1292(b) (App., *infra*, 9a-10a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 2002. App., *infra*, 1a. Rehearing was denied on September 5, 2002. App., *infra*, 19a-20a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent provisions of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990, as amended, as well as of the regulations of the Department of Justice, are set forth at App., *infra*, 21a-31a.

STATEMENT

This case is a class action brought by mobility- and vision-impaired residents of the City of Sacramento, California, against the City and its Director of the Department of Public Works (petitioners here). Alleging disability discrimination under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a), and Section 202 of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132, the plaintiffs (respondents here) challenged the City's failure to install curb ramps at intersections when resurfacing or altering city streets and sidewalks and when constructing new sidewalks and streets. Significantly for present purposes, respondents also maintained that all of the *existing* sidewalks in Sacramento were public "programs" or "activities" or "services." Thus, they alleged, the City was required, under the

ADA and the Rehabilitation Act, to ensure accessibility of the *existing* sidewalks to persons with disabilities (including the respondent class of wheelchair-bound and vision-impaired citizens). According to respondents, the Acts require the City to alter, reconfigure, or even rebuild its *existing* sidewalks to widen surfaces; move benches, fire hydrants, utility poles, traffic signal poles, telephone poles, trees, newspaper racks, guide wires, mailboxes, and other package service receptacles; eliminate roots and other protruding objects that might present an obstacle to individuals in wheelchairs or with vision impairments; and eliminate all abrupt changes in level of more than ¼ inch (or ½ inch if the change in level is beveled), including flares and cross slopes where private driveways cross sidewalks.

After the City agreed to install curb ramps on newly constructed or altered streets and sidewalks, the district court ruled that the existing public sidewalks do not constitute a "program, service or activity" covered by the ADA and thus granted summary judgment to the City on the remaining federal claims. The Ninth Circuit reversed, holding that the ADA and Rehabilitation Act cover "anything a public entity does" and any "normal function of a governmental entity" – including ownership of public rights-of-way and physical infrastructure such as sidewalks.

A. The Statutory and Regulatory Framework and This Court's Decision in *Yeskey*

1. The Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355, authorizes funding of certain services for the disabled and imposes certain conditions on the recipients of federal funds. Among other things, the Act (in Section 504) bars discrimination against persons with disabilities under federal grants and programs. 29 U.S.C. § 794(a). Specifically, Section 504 provides that "[n]o otherwise qualified individual with a disability in the United States * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any *program or activity* receiving Federal financial assistance." 29

U.S.C. § 794(a) (emphasis added). For purposes of this mandate, "program or activity" is defined as including "all of the operations of * * * a department, agency, * * * or other instrumentality of a State or of a local government." *Id.* § 794(b).

In 1990, Congress passed the Americans with Disabilities Act (ADA). The ADA applies even to entities that do not receive federal funding. Each of the ADA's three titles addresses discrimination against the disabled in a different area: Title I relates to employment, Title II relates to public services, and Title III relates to public accommodations. 42 U.S.C. §§ 12111-12189; see *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 675 (2001).

Title II includes a provision – modeled after Section 504 of the Rehabilitation Act – that provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the *services, programs, or activities* of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132 (emphasis added). The ADA does not define "services, programs, or activities,"[1] but it does define "qualified individual with a disability" as someone with a disability "who, with or without reasonable modifications to the rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." *Id.* § 12131(2).

The ADA directs the Attorney General to issue regulations to implement these provisions of Title II. 42 U.S.C. § 12134(a); see generally 28 C.F.R. Part 35. To the extent that such regulations involve "program accessibility" for "existing facilities,"

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[1] The ADA defines a "public entity" to include "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. § 12131(1)(B). There is no dispute that petitioner City of Sacramento falls within this definition.

they must be consistent with the "regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under" Section 504 of the Rehabilitation Act. 42 U.S.C. § 12134(b).

2. The Justice Department's Title II "program accessibility" regulations require that no person with a disability shall be denied the benefits of or participation in any program, service, or activity "because a public entity's facilities are inaccessible to or unusable by persons with disabilities." 28 C.F.R. § 35.149. "Facility" is a defined term under the regulations (see *id.* § 35.104), encompassing any place where a program, service, or activity is offered. See App., *infra*, 27a-28a.

The program accessibility regulations impose different requirements with respect to "existing facilities" (28 C.F.R. § 35.150) than with regard to "new construction and alterations" of facilities (*id.* § 35.151). As for existing "facilities," public entities are required to "operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." *Id.* § 35.150(a). That obligation, however, "does not * * * [n]ecessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities." *Id.* § 35.150(a)(1). Nor does the obligation "[r]equire a public entity to take any action that it can demonstrate would result" either in "a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." *Id.* § 35.150(a)(3). The requirements imposed on new construction and alterations of facilities are more far-reaching. See *id.* § 35.151; see also App., *infra*, 28a-31a.[2]

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[2] For example, the regulations require all "newly constructed or altered" streets, roads, highways, and "street level pedestrian walkways" to "contain curb ramps or other sloped areas" at all intersections. 28 C.F.R. § 35.151(e)(1); see also *Kinney* v. *Yerusalem*, 9 F.3d 1067 (3d Cir. 1993) (resurfacing of streets constitutes "alteration" triggering the obligation to install curb ramps).

3. In *Pennsylvania Dep't of Corrections* v. *Yeskey*, 524 U.S. 206 (1998), this Court held that a motivational boot camp in Pennsylvania's prison system qualified as a "service[], program[], or activit[y]" covered by the ADA. Rejecting the argument that Title II of the ADA categorically exempts all state correctional facilities, the Court carefully examined the text of the statute and concluded that "[s]tate prisons fall squarely within the statutory definition of 'public entity[].'" *Id.* at 210. Moreover, "[m]odern prisons provide inmates with many recreational 'activities,' medical 'services,' and educational and vocational 'programs'" – and there is "no basis" in the ADA's text "for distinguishing those programs, services, and activities from those provided by public entities that are not prisons." *Ibid.* Even "the [Pennsylvania] statute establishing the * * * Boot Camp," the Court noted, "refers to it as a 'program.'" *Ibid.*

B. The Proceedings Below

1. Respondents brought this action in the United States District Court for the Eastern District of California. On behalf of themselves and others similarly situated, respondents alleged in their first amended complaint that the City of Sacramento "discriminate[s] against persons with disabilities" by, among other things, (1) "routinely failing to install proper curb ramps (also known as 'curb cuts') when resurfacing, repairing, and/or altering city streets and/or sidewalks" and by (2) "failing to ensure program access to public rights-of-way." C.A. ER 2.

In a stipulation, the parties agreed, among other things, that the case should be certified as a class action on behalf of "all persons with mobility and/or vision disabilities who seek full and equal access pertaining to curb cuts and sidewalks in the City of Sacramento's public rights of way." C.A. E.R. 33. The district court, acting on the parties' stipulation, certified a class action pursuant to Fed. R. Civ. P. 23(b)(2) with the individual plaintiffs to serve as class representatives. C.A. E.R. 35.

Respondents filed a motion for summary adjudication seeking a determination that the sidewalks themselves are covered

by the program access requirements of the ADA and the Rehabilitation Act. On the same day, petitioners filed a motion for partial summary judgment seeking approval of the City's Transition Plan for Curb Ramps as well as a determination that the sidewalks themselves are not "programs," "services," or "activities." In agreeing to build curb ramps but resisting plaintiffs' efforts to characterize the sidewalks as "programs" that must be made accessible, petitioners acknowledged that the City's program of *constructing* new sidewalks qualifies as a "program" subject to the ADA and the Rehabilitation Act. They also acknowledged that the City's program of *maintaining* its existing sidewalks qualifies as a "program" covered by those laws – so that, for example, the City could not lawfully neglect the upkeep or repair of existing curb ramps while at the same time repairing curbs or other features not used by the disabled. The City also acknowledged that, in certain cases where public services, programs or activities are offered in buildings or other facilities that are inaccessible without modifications to abutting sidewalks, the City might be required by the ADA and the Rehabilitation Act to ensure that the sidewalks allowed full access to such programs. But petitioners disagreed *that the sidewalks themselves* were "programs" or "services" or "activities" covered by these federal antidiscrimination laws.[3]

2. At a hearing on the parties' motions, the district court indicated that it had great difficulty seeing how "sidewalks can be and can fit the definition" of a "service," "program," or "activity" covered by the ADA or the Rehabilitation Act. Tr. 70. At most, the court explained, a sidewalk might qualify as "part of a facility" where public programs or services are offered or activities conducted. *Ibid.* To illustrate, the district court gave the example of a stadium where "football game[s]" or "track

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[3] Subsequently, the parties settled the issue of curb ramps and stipulated to the entry of an injunction under which the City agreed to a detailed schedule for installing approximately 1500 curb ramps each year. See App., *infra*, 11a-18a; C.A. ER 262.

meets" are conducted (a stadium that is inaccessible to persons in wheelchairs without "a walkway around the outside"). *Ibid.* The walkway in this example, the district court reasoned, "could well be called part of the *facility* for the service, [but] not a *service*. I don't think the walkway would be a service and I don't think it would be a program. But I think it would be part of a facility to furnish programs." *Ibid.* (emphasis added).

The district court later entered an order formally granting petitioners' motion for partial summary judgment "for [the] reasons stated in open court." App., *infra*, 9a. "[S]idewalks," the court explained, "are not a program, service, or activity of the City of Sacramento, and thus are not subject to the program access requirements of the ADA or Section 504 of the Rehabilitation Act." *Ibid.* The district court certified its order for interlocutory appeal under 28 U.S.C. § 1292(b). App., *infra*, 9a.

3. The Ninth Circuit reversed. App., *infra*, 1a-8a. In holding that "public sidewalks in the City of Sacramento are a service, program, or activity" under Title II of the ADA (and presumably a "program or activity" under Section 504 of the Rehabilitation Act), the court thought it unnecessary actually to "determin[e] whether each function of a city can be characterized as a service, program, or activity." App., *infra*, 5a. Such an inquiry into the meaning of the statute's words, according to the panel, would amount to "needless hair-splitting" because those terms encompass "'"*anything* a public entity *does*."'" *Id.* at 5a-6a (emphasis added). The panel opined that the operative question was "not so much * * * whether a particular public function can *technically* be characterized as a service, program, or activity, but whether it is a *'"normal function of a governmental entity."'"* *Id.* at 6a (emphasis added).

Applying that test, the panel next ruled that "*maintaining* public sidewalks is a normal function of a city and "without a doubt something that the [City] 'does.'" App., *infra*, 6a (emphasis added) (quoting *Hason* v. *Medical Bd. of Cal.*, 279 F.3d 1167, 1173 (9th Cir. 2002), cert. granted, 72 U.S.L.W. 3247

(Nov. 18, 2002) (No. 02-479)). "Maintaining their accessibility for individuals with disabilities," the panel then reasoned, "therefore falls within the scope of Title II." *Ibid.*

The panel also purported to find support for this conclusion in (1) "the plain language of the Rehabilitation Act," which defines "program or activity" as including "all of the operations of" a qualifying local government (29 U.S.C. § 794(b)(1)(A)); (2) snippets drawn from the ADA's "legislative history"; and (3) "the tenor of" a Justice Department regulation, 28 C.F.R. § 35.150, which relates to the content of "transition plans" that public entities must adopt under certain circumstances. App., *infra*, 6a-7a. The panel made no attempt to explain how a sidewalk could constitute an "operation." Nor did the panel explain how scattered references in the legislative history to "actions" or "activities" of local governments supported its holding.

As for the "tenor" of the Justice Department regulations, the panel pointed to 28 C.F.R. § 35.150(d), which requires a public entity with more that 50 employees that chooses to "achieve program accessibility" by making "structural changes to facilities" to develop a "transition plan." *Id.* § 35.150(d)(1). If the public entity has "responsibility or authority over streets, roads, or walkways," then "its transition plan" must "include a schedule for providing curb ramps or other sloped areas where pedestrian walks cross curbs, giving priority to walkways serving entities covered by the Act, including State and local government offices and facilities, transportation, places of public accommodation, and employers, followed by walkways serving other areas." *Id.* § 35.150(d)(2). In the panel's view, Section 35.150(d)(2) "requires the provision of curb ramps," not only for "priority" walkways serving government offices, transportation, places of public accommodation, and employers, "but also for walkways serving other areas." App., *infra*, 7a (internal quotations omitted). Section 35.150's "requirement of curb ramps in all pedestrian walkways," the panel opined, "reveals a general concern for the accessibility of public sidewalks, as well as a recognition that sidewalks fall within the ADA's coverage,

and would be meaningless if the sidewalks between the curb ramps were inaccessible." *Ibid.* Moreover, the court said, although the Justice Department's regulation was "ambiguous" with respect to whether "sidewalks are subject to the accessibility regulations," the Department in an *amicus* brief submitted to the court had interpreted its regulation as covering sidewalks, and that interpretation was "entitled to deference." *Ibid.*

REASONS FOR GRANTING THE PETITION

Has every city in American been under an obligation for more than a decade – though never until this litigation noticed by the Justice Department or any court – to make every *existing* sidewalk accessible, subject only to a case-by-case defense of "undue burden"? That is the question the Ninth Circuit blithely answered "yes," dismissing analysis of the words of the statute – "program," "service," or "activity" – as mere hair-splitting. That breathtakingly broad holding requires torturing the statutory language to make infrastructure into a "program," "service," or "activity." To the extent it relies on the Justice Department's effort to interpret the language by promulgating an ambiguous regulation, interpreting its regulation in a brief, and demanding deference, it defies the principle that "we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

As a result of the Ninth Circuit's decision, public entities in Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, the Northern Mariana Islands, Oregon, and Washington will be subject to the requirement – under the Justice Department's implementing regulations – to "operate each" existing sidewalk so that, "when viewed in its entirety, it is readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150. As respondents acknowledged below, the question whether sidewalks are a "program," "service," or "activity" that must be rendered accessible to individuals with mobility-

based, vision-based, or other types of disabilities is one of "profound" importance. Resp. C.A. Reply Br. 2. And, if sidewalks qualify as a public program, activity, or service, it is difficult to see why the same would not be true of roads, bridges, buildings and other types of physical infrastructure owned (and therefore from time to time "maintained") by public entities. (Indeed, respondents have contended in the court below that all streets in Sacramento are also covered.) The fiscal ramifications of the Ninth Circuit's ruling are staggering.

Beyond erroneously resolving an issue of surpassing importance, the Ninth Circuit's decision warrants review because it offers a valuable opportunity to dispel the widespread confusion in the lower courts over what constitutes a public "program," "activity," or "service" covered by Title II of the ADA and Section 504 of the Rehabilitation Act. In *Pennsylvania Dep't of Corrections* v. *Yeskey*, *supra*, this Court rejected an argument for a categorical exclusion from the ADA for "programs" offered to inmates by state prisons. Although the Court had no occasion in *Yeskey* to delineate the outer boundaries of the terms "programs," "activities," and "services," it did make clear that those boundaries are identified by careful examination of the statutory language. Ignoring that teaching, the Ninth Circuit in this case essentially threw up its hands, characterizing any inquiry into the meaning of the operative words of these statutes as "technical[]" and "needless hair-splitting" and concluding that the ADA and Rehabilitation Act cover "*anything* a public entity does." App., *infra*, 5a-6a (emphasis added). The Ninth Circuit's approach conflicts with the approaches of other circuits and reflects pervasive confusion in the lower courts – before and after *Yeskey* – that warrants this Court's attention.

I. THE NINTH CIRCUIT'S DECISION IS INCONSISTENT WITH *YESKEY* AND WITH THE RESULTS REACHED BY OTHER COURTS

The Ninth Circuit expressly declined to analyze the operative language of the ADA and the Rehabilitation Act. In that

court's view, "[a]ttempting to distinguish which public functions are services, programs, or activities, and which are not, would disintegrate into needless 'hair-splitting arguments.'" App., *infra*, at 5a-6a (quoting *Innovative Health Sys., Inc.* v. *City of White Plains*, 117 F.3d 37 (2d Cir. 1997), superseded on other grounds, *Zervos* v. *Verizon New York, Inc.*, 252 F.3d 163, 171 n.7 (2d Cir. 2001)). "Rather than determining whether each function of a city can be characterized as a service, program, or activity for purposes of Title II," the panel explained, "we have construed 'the ADA's broad language [as] bring[ing] within its scope *anything* a public entity *does*.'" App., *infra*, 5a (emphasis added) (quoting *Lee* v. *City of Los Angeles*, 250 F.3d 668, 691 (9th Cir. 2001)). "The focus of the inquiry," the court added, "is * * * whether [a particular function] is a '*normal* function of a government entity.'" App., *infra*, 6a (emphasis added) (quoting *Bay Area Addiction Research & Treatment, Inc.* v. *City of Antioch*, 179 F.3d 725, 731 (9th Cir. 1999)).

The Ninth Circuit's broad interpretation follows the lead of the Second Circuit. In *Innovative Health Systems*, *supra*, a panel of the Second Circuit held that Title II covers a public entity's zoning decisions.[4] According to the Second Circuit, the ADA (and the Rehabilitation Act) encompass zoning decisions "because making such decisions is a normal function of a governmental entity." 117 F.3d at 44. The Second Circuit further held that "the language of Title II's anti-discrimination provision does *not* limit the ADA's coverage to conduct that occurs in the 'programs, services, or activities' of the City. Rather, it

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[4] In so ruling, the Second Circuit departed from the nearly uniform approach taken by the district courts, which had held that zoning decisions are not a program, service, or activity under Title II. See, *e.g.*, *United States v. City of Charlotte*, 904 F. Supp. 482, 484-85 (W.D.N.C. 1995); *Kessler Inst. for Rehab., Inc.* v. *Mayor and Council of Borough of Essex Falls*, 876 F. Supp. 641, 655 (D.N.J. 1995); *Moyer* v. *Lower Oxford Township*, No. Civ. A. 92-3348, 1993 WL 5489, *2 (E.D. Pa. 1993); *Burnham* v. *City of Rohnert Park*, No. C. 92-1439SC, 1992 WL 672965, *5 n.9 (N.D. Cal. 1992).

is a catch-all phrase that prohibits *all* discrimination by a public entity * * *." *Id.* at 44-45 (emphasis added).

A. The Ninth Circuit's approach to determining the scope of Title II of the ADA and Section 504 of the Rehabilitation Act is in considerable tension with *Yeskey*. In that case, the Court held that a motivational boot camp offered in Pennsylvania's prison system qualified as a "service[], program[], or activit[y]" covered by the ADA. In refusing to hold that Title II categorically exempted state prisons, the Court focused on the meaning of "'programs, services, or activities' as those terms are ordinarily understood" (524 U.S. at 210), explaining:

> Modern prisons provide inmates with many recreational "activities," medical "services," and educational and vocational "programs," all of which theoretically "benefit" the prisoners (and any of which prisoners could be "excluded from participation in").

Ibid. The Court noted, moreover, that "the statute establishing the Motivational Boot Camp at issue in this very case refers to it as a 'program.'" *Ibid.* Finally, in rejecting the Commonwealth's contention that prisons are exempt from Title II because prisoners do not seek to participate in them, the Court again examined the statutory text and concluded that "the words do not connote voluntariness." *Id.* at 211. The Court also noted, for example, that "[t]he prison law library" is "a service" that "prisoners are free to take or leave." *Ibid.* Throughout its analysis, the Court focused on the prison operations that naturally fell within the terms "activities," "services," and "programs."

Moreover, in focusing on the plain meaning of the statutory terms, this Court departed from the approach that the Third Circuit (whose ruling the Court affirmed) had taken. The Third Circuit (like the panel opinion below) had held that the term "activity" included any "natural or normal function or operation" of government. See 118 F.3d 168, 170 (3d Cir. 1997) (internal quotations omitted). Similarly, the Third Circuit had held that the ADA's "broad language is intended to appl[y] to

anything a public entity does." *Id.* at 171 (internal quotations omitted). The Ninth Circuit in this case expressly relied on the Third Circuit's opinion in *Yeskey* in articulating its broad approach to ascertaining whether something is covered by Title II. By abdicating its duty to assess whether sidewalks fit within the statutory term "programs, services, and activities" because such an inquiry would "disintegrate in to needless 'hair-splitting arguments'" (App., *infra*, 6a), the Ninth Circuit departed from the approach taken by this Court in *Yeskey*.

B. The Ninth Circuit's view that Title II of the ADA applies to "anything a public entity does" so long as it is a "normal function of a government entity" brings within Title II numerous matters that other federal circuits, and certain state courts, have determined are *not* programs, services, or activities of a public entity. The Court should grant review to clarify, and bring uniformity to, this important area of federal law.

1. *Arrests*. The Fourth and the Fifth Circuits have refused to treat police officers' conduct in arresting a suspect as a program, service, or activity under Title II. In *Rosen* v. *Montgomery County*, 121 F.3d 154 (4th Cir. 1997), a deaf plaintiff argued that a county's failure to provide a interpreter and a TTY telephone during an arrest for drunk driving violated Title II of the ADA. The Fourth Circuit held that an arrest is not a "program or activity." "[C]alling a drunk driving arrest a 'program or activity' of the County, the 'essential eligibility requirements' of which (in this case) are weaving in traffic and being intoxicated, strikes us as a stretch of the statutory language and of the underlying legislative intent." 121 F.3d at 157; see also *id.* at 158 (the plaintiff "was in no way 'denied the benefits of' his arrest").

Similarly, in *Hainze* v. *Richards*, 207 F.3d 795 (5th Cir.), cert. denied, 531 U.S. 959 (2000), the Fifth Circuit held that an officer's use of force during an arrest is not actionable as a program, service, or activity. There, a mentally disabled arrestee argued that he was denied the benefits of the defendant county's mental health training when an officer (supposedly in

contravention of that training) used force to restrain him. *Id.* at 800. The court rejected the plaintiff's claims, holding that "Title II does not apply to an officer's on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects of mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life." *Id.* at 801.[5]

Under the Ninth (and Second) Circuit's interpretation, these decisions would have come out the other way. Certainly, an arrest by a law enforcement officer is something "a public entity does." Nor can there be any serious question that law enforcement is "a normal function of a government entity."

In reaching the conclusion that Title II does not require police officers to accommodate a disability during an arrest because an arrest is not a "service[], program[], or activit[y]," several courts have carefully distinguished situations in which an officer arrests an individual *because of his or her disability*. These courts have interpreted Section 12132 as containing two independent clauses: one addressing reasonable accommodation (the "programs, services, and activities" clause), and another addressing intentional discrimination (the "subjected to discrimination" clause). See 42 U.S.C. § 12132 ("no qualified individual with a disability shall, by reason of such disability, [1] be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or [2] be sub-

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[5] Several district courts have similarly concluded that Title II does not require a public entity to accommodate a suspect's disability during an arrest. See, *e.g.*, *Crocker* v. *Lewiston Police Dep't*, No. 00-13-PC, 2001 WL 114977, *8 (D. Me. 2001); *Patrice* v. *Murphy*, 43 F. Supp. 2d 1156 (W.D. Wash. 1999); *Gorrell* v. *Delaware State Police*, No. Civ. A. 98-649 SLR, 1999 WL 1893142, *3-*4 (D. Del. 1999). But see *Gohier* v. *Enright*, 186 F.3d 1216 (10th Cir. 1999) (holding that there is no rule categorically barring application of Title II to arrests); cf. *Gorman* v. *Bartch*, 152 F.3d 907 (8th Cir. 1998) (transportation of suspect to police station after arrest covered by Title II).

jected to discrimination by any such entity"). Relying on the second clause, these courts have stated that, when the police misperceive the effects of a disability as criminal activity, they have chosen a course of action *because of* the individual's disability in violation of the proscription against intentional discrimination set forth in the second clause. See *Gohier* v. *Enright*, 186 F.3d 1216, 1220 (10th Cir. 1999) (surveying cases); *Hainze*, 207 F.3d at 800. According to these courts, such conduct is qualitatively different from instances in which the police merely fail to accommodate a disability during an arrest.

Unlike the Fifth and Tenth Circuits, the Ninth Circuit does not read Section 12132 as containing two completely independent clauses. See *Zimmerman* v. *Oregon Dep't of Justice*, 170 F.3d 1169, 1175 (9th Cir. 1999) ("The second clause of Section 12132 * * * must relate to a government service, program, or activity * * *."), cert. denied, 531 U.S. 1189 (2001). Because the Ninth Circuit treats the second clause as inextricably linked to the first, it reasoned in this case that the second clause *expanded* on the scope of Title II to cover more functions than just those that can be "characterized" as "programs" or "services" or "activities." App., *infra*, 5a. See also *Innovative Health*, 117 F.3d at 45 ("[T]he language of Title II's anti-discrimination provision does not limit the ADA's coverage to conduct that occurs in the 'programs, services, or activities' of the City. Rather, it is a catch-all phrase that prohibits discrimination by a public entity, regardless of the context * * *."). At the same time, the Ninth Circuit failed to grasp that the claim in this case was not one of outright intentional discrimination by the City in violation of the second clause but rather of a failure by the City to accommodate the respondents' disability – a claim, in other words, that the respondents had been "excluded from participation in or be[en] denied the benefits of the services, programs, or activities of" the City. 42 U.S.C. § 12132.

Guidance from this Court is needed to clarify the relationship between these two clauses and to bring greater uniformity to the lower courts' conflicting interpretations.

2. *Employment*. Consistent with the broad standard set out by the Ninth Circuit here, the Eleventh Circuit has concluded that employment by a public entity is actionable under Title II of the ADA (even though Title I separately governs employment by most employers). See *Bledsoe* v. *Palm Beach County Soil & Water Conservation Dist.*, 133 F.3d 816, 820-25 (11th Cir.), cert. denied, 525 U.S. 826 (1998). That court found the language of the ADA unilluminating as to what the terms "program, service, or activity" mean. Nonetheless, it adopted the statement in *Innovative Health Systems* that "Title II's antidiscrimination provision does not limit the ADA's coverage to conduct that occurs in the 'programs, services, or activities' [of a public entity]" (*id.* at 822 (brackets in original)). Relying on this reading of Title II, as well as the legislative history and the Justice Department's ADA regulations (see 28 C.F.R. § 35.140(a)), the Eleventh Circuit held that Title II encompasses employment. Many other district courts have followed suit. See *Downs* v. *Massachusetts Bay Transp. Auth.*, 13 F. Supp. 2d 130, 135 (D. Mass. 1998); *Ethridge* v. *Alabama*, 847 F. Supp. 903, 906 (M.D. Ala. 1993); *Saylor* v. *Ridge*, 989 F. Supp. 680, 688 (E.D. Pa. 1998); *Magee* v. *Nassau County Medical Center*, 27 F. Supp. 2d 154, 159 (E.D.N.Y. 1998).

Other courts, including (oddly) the Ninth Circuit, have come to the opposite conclusion. Rather than rely on the expansive definition used by the lower court in this case, and by the Eleventh Circuit in *Bledsoe*, these courts have developed a different test for ascertaining whether a government function is a program, service, or activity. According to these courts, "[t]he phrase 'services, programs, or activities' * * * understood as a whole, focuses on a public entity's *outputs* rather than its *inputs*." *Decker* v. *Univ. of Houston*, 970 F. Supp. 575, 578 (S.D. Tex. 1996) (emphasis added), aff'd mem., 159 F.3d 1355 (5th Cir. 1998). See also *Zimmerman*, 170 F.3d at 1174; *Currie* v. *Group Ins. Comm'n*, 147 F. Supp. 2d 30, 34-35 (D. Mass. 2001), stay granted, 290 F.3d 1 (1st Cir. 2002). As the Ninth Circuit has explained the distinction:

> Consider, for example, how a Parks Department would answer the question, "What are the services, programs, and activities of the Parks Department?" It might answer, "We operate a swimming pool; we lead nature walks; we maintain playgrounds." It would not answer, "We buy lawnmowers and hire people to operate them." The latter is a *means* to deliver the services, programs, and activities of the hypothetical Parks Department, but it is *not itself* a service, program, or activity of the Parks Department.

Zimmerman, 170 F.3d at 1174 (emphasis added). Each of the courts that has used this analytical framework has concluded that employment is an "input," not an "output," and therefore is not a service, program, or activity under Title II. See also *Patterson* v. *State Dep't of Corrections*, 35 F.Supp. 2d 1103 (C.D. Ill. 1999) (Title II does not cover employment).

Under the Ninth Circuit's approach adopted in *this* case, however, employment *would* be a covered "service, program or activity." Like making arrests, hiring people to execute the functions of government is plainly something a public entity "does." It is also readily characterized as a "normal function" of government. Yet employment is not a program, service, or activity under the input/output analysis. Review by this Court in this case would clarify the validity of the input/output distinction, which petitioners expressly invoked in the court below.

3. *Proceedings Involving the Termination of Parental Rights*. State family courts conduct proceedings involving the "termination of parental rights" in which a court-appointed lawyer or other interested person petitions the court to terminate a parent's custodial rights. At times, parents have contended that any decision on custodial rights should not discriminate against them based on their disabilities. State courts have uniformly rejected this argument on the ground that "termination proceedings are not 'services, programs, or activities' within the meaning of Title II of the ADA." *In re Anthony B.*, 54 Conn. App. 463, 471-72 (Conn. App. 1999) (internal quotations and

ellipses omitted); see also *In re Terry*, 240 Mich. App. 14, 24 (2000) ("termination proceedings are not 'services, programs, or activities' under the ADA"); *In re BFK*, 704 So. 2d 314, 317 (Ct. App. La. 1998) (same); *In re B.S.*, 693 A.2d 716, 720 (Vt. 1997) (same); *In re Torrance P.*, 522 N.W.2d 243, 245-46 (Ct. App. Wis. 1992) (ADA not a basis to attack court order in termination of parental rights proceeding). On the basis of that reasoning, state courts have concluded that "the ADA neither provides a defense to nor creates special obligations in a termination proceeding." *In re Anthony B.*, 54 Conn. App. at 472.

Again, these decisions would have come out differently under the tests used by the Ninth and Second Circuits. A termination-of-parental-rights proceeding is a "normal function of government." Making a decision as to whether a parent may have custodial, visitation, or other parental rights vis-à-vis a child is something a public entity (*i.e.*, a state court) does. Nonetheless, every state court of which we are aware has held that these proceedings are not covered by the ADA.[6]

This Court should take this opportunity to dispel the substantial confusion in the lower courts.

II. THIS ISSUE IS OF GREAT PUBLIC IMPORTANCE

The decision that a municipal government's sidewalks (or any other piece of a public entity's infrastructure) are "programs, services, or activities" under Title II is of paramount importance, both because of the cost of compliance and because of the potential doctrinal ramifications of the lower court's ruling.

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[6] In contrast to these state court decisions, the Second Circuit has held in *Innovative Health* that another type of state proceeding – zoning decisions – is covered by Title II of the ADA. See pages 11-12, *supra*. The Ninth Circuit has also reached the same conclusion with respect to zoning decisions and other state proceedings. See *Bay Area Addiction Research and Treatment*, 179 F.3d at 731 (zoning); *Thompson* v. *Davis*, 295 F.3d 890 (9th Cir. 2002) (parole proceedings), pet. for cert. filed, __ U.S.L.W. __ (Nov. 4, 2002) (No. 02-724).

Respondents admitted in the Ninth Circuit that this issue was of "profound" importance. Resp. C.A. Reply Br. 2. For that reason as well, further review is urgently needed.

If permitted to stand, the Ninth Circuit's decision will impose on the City of Sacramento a duty to make all of its existing sidewalks "accessible" to persons with disabilities. Sacramento must undertake to make each sidewalk accessible even if the City is not in the process of building, altering, or repairing that infrastructure. Sacramento has thousands of miles of sidewalks; the cost of complying with such a ruling is no doubt very substantial indeed. According to respondents, the ADA and the Rehabilitation Act require the City to alter, reconfigure, or even rebuild its existing sidewalks to widen surfaces; move fire hydrants, benches, utility poles, traffic signal poles, telephone poles, trees, newspaper racks, guide wires, mailboxes, and other package service receptacles; eliminate roots and other protruding objects that might present an impediment or obstacle to individuals in wheelchairs or with vision impairments; and eliminate all abrupt changes in level of more than ¼ inch (or ½ inch if the change in level is beveled), including flares and cross slopes where private driveways cross sidewalks.

Moreover, although this case concerns only the City of Sacramento, the holding of the lower court – that sidewalks are covered by Title II of the ADA and the Justice Department's "program accessibility" regulations, 28 C.F.R. § 35.149 – obviously is binding precedent throughout the entire Ninth Circuit. In other words, every sidewalk on all 450,000 miles of roads in the nine States that comprise the Ninth Circuit arguably must now be made ADA-compliant.[7]

The cost of complying with the Ninth Circuit's ruling will be enormous. It is difficult to imagine that any municipality exists without some broken sidewalks or obstacles to travel such

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[7] See www.fhwa.dot.gov/ohim/1994/section5/hm-14.pdf. This figure excludes roads under federal control.

as benches, utility poles, signs, mailboxes, and guide wires. And most municipalities (especially those with historic areas) have sidewalks that do not meet the ADA's width requirements, and that have steep cross slopes. One estimate of the cost of sidewalk construction is $36,000 per mile (see www.commuterservices.com/costs.htm). This expense will cause serious strains on tight municipal budgets and interfere with competing demands on government funds.

Nor are sidewalks the only item of publicly owned or maintained property affected by the Ninth Circuit's ruling. Under the panel's reasoning, any piece of property that is at any time "maintained" by a public entity – even if the public entity is not currently expending funds on that property, and even if that property is not necessary to access a public service – is arguably covered by Title II of the ADA. Thus, *every piece of a municipality's infrastructure* is arguably now a "program, service, or activity," and must be made accessible under the ADA. For example, under the Ninth Circuit's ruling, every *road* is covered by Title II (a point that respondents themselves have urged in the lower courts). If that is so, then no person with a disability can be denied the benefits of roads. The implications are staggering. There are approximately 450,000 miles of roads in the Ninth Circuit alone, and more than 3,730,000 miles of roads nationwide. See www.fhwa.dot.gov/ohim/1994/section5/hm-14.pdf. What measures would have to be taken to ensure that persons with disabilities can enjoy "the benefits" of roads? Will every road have to be passable by foot and by wheelchair for persons who are unable to drive? The potential cost of making all roads ADA compliant is exorbitant.

Contrary to respondents' suggestion below, the cost of complying with the Ninth Circuit's ruling and the ramifications of that ruling are not meaningfully alleviated by the availability of an "undue burden" defense articulated in the DOJ regulations. See 28 C.F.R. § 35.150(a)(3) (stating that the obligation to make public facilities accessible does not "[r]equire a public entity to take any action that it can demonstrate would result "in

undue financial and administrative burdens"). *First*, before a municipality can take advantage of this provision, it must undertake an assessment of the piece of infrastructure at issue, determine whether it complies with the ADA's accessibility requirements, what measures are needed to bring it into compliance, and how much those measures would cost. That alone will entail tremendous administrative burdens and costs.

This administrative burden is exacerbated, in many instances, because the public entities – who are the only parties required to comply with the ADA – may not be the only entities with control over the obstacles to accessibility. Sidewalks are a good example. Transit authorities place bus benches on sidewalks. Electric companies set down guide wires. And broken sidewalks are often caused by roots of trees on private landowners' property. Thus, to determine how it could comply with the ADA's accessibility requirements and what the cost of compliance would be, a public entity would be required to coordinate with a host of other entities.

Second, the regulations place the burden of proof on the public entity to establish the undue-burden defense. See 28 C.F.R. § 35.150(a)(3). As a consequence, public entities will be forced to incur costs associated with defending ADA lawsuits and responding to Justice Department inquiries demanding that sidewalks, roads, buildings, and anything else owned by a municipality be made accessible. All of these costs – whether related to self-assessment of compliance or to litigation and investigations – will be incurred regardless of whether it is ultimately determined that an undue financial or administrative cost is associated with complying with the accessibility requirements.

Third, even if a public entity succeeds in establishing the undue-burden defense, it will still be required under the Justice Department's regulations to "take any other action that would not result in * * * such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services

provided by the public entity." 28 C.F.R. § 35.150(a)(3). The undue-burden defense is therefore cold comfort indeed.

III. THE DECISION BELOW IS WRONG

Finally, review is warranted because the Ninth Circuit's sweeping interpretation of two important federal statutes is manifestly incorrect. The panel below erred by refusing (contrary to this Court's teaching in *Yeskey*) to conduct *any* inquiry into whether the operative language of the statutes – which reach only "programs," "activities," and (in the case of the ADA) "services" – covers existing sidewalks owned by a public entity. Careful analysis of the text of the statute, as well as its structure and purposes, would yield the opposite result.

The Ninth Circuit's analysis began with the misconception that Title II applies to "anything a public entity does" (App., *infra*, 5a), so long as it can be characterized as a "normal function of a governmental entity" (*id.* at 6a). Then, seemingly untroubled by the fact that a sidewalk is neither a "function" nor something a public entity "does," the Ninth Circuit simply added the word "maintaining" (*ibid.*) in front of the word "sidewalk" to reach the conclusion that *sidewalks themselves* are programs, services, and activities under the ADA. Finally, the lower court afforded deference to the Justice Department's litigating position that sidewalks are covered by Title II and the Department's regulations (which the Ninth Circuit admitted were "ambiguous") relating to access to existing public facilities. The Ninth Circuit's analysis was flawed at every turn.

A. The Ninth Circuit erred when it refused to decide "whether a particular public function" – here, a sidewalk – can be "characterized as a service, program, or activity" (App., *infra*, 6a). When the statutory text is unambiguous, as this text is (*Yeskey*, 524 U.S. at 212), a court's only role is to determine whether the facts at issue fit within the statutory framework. In other words, there is no need to add a judicial gloss to a statute when its own terms are clear. Thus, the Ninth Circuit was required to do the one thing it refused even to attempt – decide

whether a sidewalk can properly be described as a "program," "service," or "activity." See page 7, *supra*.

Equally flawed was the Ninth Circuit's suggestion that the ADA covers any "normal function" of government. That gloss is both over- and under-inclusive. It is under-inclusive because it excludes from the ADA's reach innovative government programs, which may not represent a typical or traditional function of government, but that nonetheless provide a benefit to the public. The boot camps in *Yeskey* are one example. For another example, suppose a city decided to provide general investment advice to its residents, but elected not to print the written materials it distributed in braille. Is the dissemination of investment advice a "normal function" of a municipal government? No. But there is no doubt that this would be a public "program" or "service" covered by the ADA. The Ninth Circuit's standard is also over-inclusive. As we explained above, it is certainly a "normal function" of government to employ people, make arrests, and conduct proceedings relating to the termination of parental rights, yet numerous courts have held that those functions are *not* covered by Title II because they are not "programs," "services," or "activities."[8]

Nor can the plain language of the ADA be expanded by reference to the Rehabilitation Act (see App., *infra*, 6a-7a). The Ninth Circuit relied on the Rehabilitation Act's definition of

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[8] Nor is the "normal function" test especially workable. That test is reminiscent of the "traditional function of government" standard used in the state action context. See, *e.g.*, *Edmonson* v. *Leesville Concrete Co., Inc.*, 500 U.S. 614, 624 (1991) (in making state action determination, considering "whether the action in question involves the performance of a traditional function of government"). The state action doctrine has been described as "'a conceptual disaster area'" – a scenario hardly worth emulating. Ronna Greff Schneider, *The 1982 State Action Trilogy: Doctrinal Contraction, Confusion, and a Proposal for Change*, 60 NOTRE DAME L. REV 1150, 1150 (1985) (quoting Black, *The Supreme Court, 1966 Term – Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967)).

"program or activity" as including "*all* of the *operations* of * * * a department, agency, * * * or other instrumentality of a State or of a local government * * * any part of which is extended Federal financial assistance." 29 U.S.C. § 794(b) (emphasis added). But subsection (b) was added by Congress in 1987 through passage of the Civil Rights Restoration Act, Pub. L. No. 100-259, 102 Stat. 28, for a specific purpose: to overturn this Court's decision in *Grove City College* v. *Bell*, 465 U.S. 555 (1984). In *Grove City*, the Court held that under similar language in Title IX, 20 U.S.C. § 1681(a), only the "program or activity" of a university that was actually receiving federal financial assistance – not the entire university – was subject to Title IX's prohibition against discrimination on the basis of sex. By amending the statute, Congress clarified that "all" programs and activities – *i.e.*, operations – of a grant recipient are covered by the statute if "any" of those programs or activities receive financial support from the federal government. In other words, Congress's reference to "operations" as a shorthand for "program or activity" was hardly intended to expand those terms. See S. Rep. No. 100-64, at 6 (1987).[9]

B. Sidewalks do not fall within the plain meaning of the words "program," "service," and "activity." A program, quite simply, is "a schedule or system under which action may be taken toward a desired goal." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1812 (1986); see also AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1324 (4th ed. 2000) (a "system of services, opportunities, or projects, usually designed to meet a social need"). A service is "[a]n act or variety of work done for

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[9] Because the Rehabilitation Act does not expand the meaning of the statutory terms, the snippets of the ADA's legislative history demonstrating Congress's intent to rely on the Rehabilitation Act (App., *infra*, 6a-7a) also do not support the Ninth Circuit's expansive reading of the statute.

others." *Id.* at 1521. And an activity is "a specified pursuit in which a person [or entity] partakes." *Id.* at 18.

Is a sidewalk any of these things? Quite plainly not.[10] A sidewalk is not a "specified pursuit" in which a public entity partakes. Nor is a sidewalk "an act done for others." And a sidewalk is not a "system under which action may be taken toward a desired goal." Instead, sidewalks are simply an important existing piece of a city's infrastructure. The conclusion that sidewalks are not themselves a program, service, or activity is confirmed, moreover, by other evidence in the statutory text. For example, the ADA defines a "qualified person with a disability" who "meets the essential eligibility requirements for the *receipt* of services or *the participation in* programs or activities *provided* by a public entity." 42 U.S.C. § 12131(2) (emphasis added). As that language makes clear, "services" are something that can be "received" by the public, and "programs or activities" are things that citizens "participate" in. No one "receives" or "participates in" a sidewalk.

This is not to say that *constructing, altering,* or *maintaining* a sidewalk is not a public program, service, or activity. The construction of a sidewalk *is* "an act done for others." So too is the maintenance of a sidewalk, and the resurfacing of streets (during which curb ramps may be constructed). But the Ninth Circuit did not require plaintiffs to show that the City of Sacramento was engaged in the construction, alteration, or maintenance of sidewalks, or for that matter in any action with regard to its sidewalks – the court purported to apply the "test" of "anything a public entity does," yet did not require the City to *do* anything before its sidewalks would be deemed covered.

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[10] "East side, west side, all around the town. The tots sang 'ring-a-rosie,' 'London Bridge is falling down.' Boys and girls together, me and Mamie O'Rourke/Tripped the light fantastic/On the [programs, services, or activities] of New York." With apologies to James W. Blake and Charles E. Lawlor, *Sidewalks of New York* (1894).

The court of appeals did, however, at one point insert the word "maintaining" in front of the word "sidewalks," and it did characterize the maintenance of sidewalks as a function of government. App., *infra*, 6a. But the Ninth Circuit had no basis for recharacterizing the issue in that way (and this method of analysis could be used to convert any item of physical infrastructure into a covered "program"). The only question before the court of appeals was whether *sidewalks themselves* are a program, service, or activity as those words are used in Title II. Under the plain meaning of the operative words of the statutes, sidewalks are not covered.

C. The Ninth Circuit was also wrong to rely on the Justice Department's litigating position that existing sidewalks are covered by Title II. To begin with, an agency's interpretation is not entitled to deference when the statute is unambiguous. *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-43 (1984); *FDA* v. *Brown & Williamson*, 529 U.S. at 125-26; *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471, 482 (1999) (rejecting construction of ADA advanced by EEOC and Justice Department even on the assumption that full *Chevron* deference was warranted). Thus, in *Yeskey*, although the Department's regulations provided that prisons were covered by the ADA, and although the Third Circuit relied on those regulations (see 118 F.3d at 171-72), *this* Court relied on the statutory language alone. 524 U.S. at 212.

Nonetheless, the Ninth Circuit relied on a Justice Department regulation (28 C.F.R. § 35.150(d)(2)) in concluding that sidewalks are a program, service, or activity under the ADA. Section 35.150(d)(1) requires public entities that elect to "achieve program accessibility" by making "structural changes in [existing] facilities" to develop a "transition plan." If the public entity has "responsibility or authority over streets, roads, or walkways," then "its transition plan" must "include a schedule for providing curb ramps or other sloped areas where pedestrian walks cross curbs, giving priority to walkways serving entities covered by the Act, including State and local government offices and facilities, transportation, places of public

accommodation, and employers, followed by walkways serving other areas." *Id.* § 35.150(d)(2). Section 35.150's "requirement of curb ramps in all pedestrian walkways," the panel asserted, "reveals a general concern for the accessibility of public sidewalks, as well as a recognition that sidewalks fall within the ADA's coverage, and would be meaningless if the sidewalks between the curb ramps were inaccessible." App., *infra*, 7a. The Ninth Circuit recognized that the regulation is "ambiguous" because it does not specifically require the accessibility of sidewalks, speaking instead only to curb cuts. *Id.* at 8a. Nonetheless, citing *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997), the court accorded deference to the Justice Department's position that this regulation and the ADA govern sidewalks.

The Justice Department's position, however, deserves no deference. To begin with, the regulation on its face applies only to public entities that choose to ensure the accessibility of programs offered in "existing facilities" by making "structural changes" to those facilities. 28 C.F.R. § 35.150(d)(1); see also *id.* § 35.150(b)(1) (indicating that one means of complying is the "alteration of existing facilities and construction of new facilities"). Even then, all the regulation requires is the formulation of a "transition plan." In certain circumstances (if the public entity has "responsibility or authority over streets, roads, or walkways"), the regulations also require the transition plan to include "a schedule for providing curb ramps or other sloped areas where pedestrian walks cross curbs" – and that schedule must "giv[e] priority" to "walkways serving entities covered by the Act, * * * followed by walkways serving other areas." *Id.* § 35.150(d)(2). Thus, the Ninth Circuit was simply wrong to suggest that this regulation "requires the provision of curb ramps." App., *infra*, 6a.

In any event, as this Court explained in *United States* v. *Mead Corp.*, 533 U.S. 218 (2001), not all agency pronouncements are entitled to the same level of deference. Instead, "'[t]he weight [accorded to an administrative] judgment in a particular case will depend upon * * * all those factors

which give it the power to persuade, if lacking the power to control." *Id.* at 228 (quoting *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)). An important factor in determining the appropriate level of deference is the agency's "'consistency with earlier and later pronouncements.'" *Mead*, 533 U.S. at 228 (quoting *Skidmore*, 323 U.S. at 140).

Far from being "consistent" with its "earlier pronouncements," the Justice Department's litigating position in the lower court contradicts its prior statements. Since the enactment of the ADA, the Department has regularly provided advice regarding public entities' duties under the statute. In every instance of which we are aware in which the Department was asked for guidance on an entity's duties with regard to a sidewalk, the Department has *not* stated that a sidewalk itself must be accessible. Instead, its has taken the position that a sidewalk is covered only insofar as it is used to access a specific program, service, or activity. Thus, in 1998 the Justice Department responded to an inquiry from a Member of Congress regarding whether the ADA requires the removal of snow and maintenance of sidewalks on a city street. According to the response provided by Bill Lann Lee, the Acting Assistant Attorney General for the Civil Rights Division:

> The focus of the [ADA's accessibility] requirement is access to services, programs, and activities, *as opposed to physical structures*. Therefore, there is no general requirement that compels a public entity to ensure that all sidewalks are free of snow.

App., *infra*, 34a (emphasis added). See also *ibid.* (noting that if a sidewalk is part of a "route that is required to provide access" to a program or activity, it would have to be accessible). Similarly, in 1995, the Department advised that a school would be required to repair a sidewalk only "if such sidewalks or walkways are necessary to ensure accessibility to the entity's programs services or activities." App., *infra*, 33a. And in 1996, the Department stated that "sidewalks must be maintained in

operable condition" *if* sidewalks were necessary to ensure that an entity's "programs, services, and activities are accessible." See www.usdoj.gov/crt/foia/cltr191.text. "Notably, *only those sidewalks that are required by the ADA to be accessible* * * * will be required to be maintained by the city." *Ibid.* (emphasis added). Of course, if sidewalks are *themselves* programs, services, or activities, this last statement would be nonsensical; *all* sidewalks would be required to be accessible. It is thus abundantly clear that the Department has consistently taken the position in the past that sidewalks are *not* covered by Title II.

Moreover, the Department's interpretation ignores and is inconsistent with the fundamental distinction – repeatedly expressed in the text of the ADA (*e.g.*, 42 U.S.C. §§ 12134(b), 12146, 12147) as well as in the Department's own regulations (*e.g.*, 28 C.F.R. §§ 35.150, 35.151) – between the obligations of public entities with respect to "existing facilities" and the far more extensive duties relating to the "new construction or alteration" of public facilities. This distinction reflects Congress's recognition that it would be impossible and undesirable to mandate the demolition and rebuilding of the nation's entire public infrastructure in order to achieve universal accessibility to persons with disabilities. Instead, Congress sought to bring about greater accessibility incrementally and in a way that balances the need for greater access with the need to ensure the efficient use of finite public resources. The statute and regulations achieve that balance by requiring public entities to focus on making their *programs*, *services,* and *activities* accessible, while at the same time permitting non-programmatic barriers to be eliminated gradually and naturally through the incorporation of accessible design features when public entities elect to construct or alter their buildings, structures or facilities. The Department's interpretation in this case – that existing sidewalks *are* programs, services or activities – destroys that careful balance in derogation of Congress's clear intent.

Under *Mead*, then, the Justice Department's new "interpretation" of its regulation – which is implausible in its own

right and inconsistent with the structure and purpose underlying the ADA – has little "power to persuade." Indeed, this litigation is the *only* instance of which we are aware in which the Department has taken the position that sidewalks are a program, service, or activity. "An interpretation advanced in a litigation brief," according to this Court, receives deference at the lowest end of the spectrum of judicial responses, "near indifference." *Mead*, 533 U.S. at 228 (citing *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212-213 (1988)). The interpretation advanced by the Justice Department in the Ninth Circuit, and accepted by that court, is therefore entitled to no deference.

* * *

The Ninth Circuit's decision imposes a massive new legal duty on thousands and thousands of state and local governments to make all public sidewalks – not to mention streets and other elements of the public infrastructure – accessible to and usable by persons with disabilities, unless the public entity can prevail in litigation on a defense of "undue burden." That sweeping and fiscally burdensome obligation was never mentioned by Congress in the text of the ADA (and the Ninth Circuit thought it was unnecessary "hair-splitting" to examine the operative statutory text). The new legal duty is instead based on a regulation of the Department of Justice that the Ninth Circuit (charitably) described as "ambiguous." Yet until it filed its brief in this case, the Justice Department had consistently taken the position in answering inquiries about the meaning of the ADA that public sidewalks are *not* themselves a "service," "program," or "activity" covered by Title II. This Court's review is sorely needed to ensure that, if in fact such a broad new obligation is to be imposed on public entities, that obligation is rooted in the text and structure of the ADA and not in statements made in Justice Department regulations that are at best ambiguous.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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NOVEMBER 2002

APPENDIX A

United States Court of Appeals,
Ninth Circuit

No. 01-15744

Joan Barden; Susan Barnhill; Jeffrey Evans;
Tony Martinez; Breda Pickern; Jeff Thom;
Suzanne Fitts Valters; Mitch Watkins,
and all other similarly situated, Plaintiffs-Appellants,

v.

City of Sacramento; Mike Kashiwagi,
Director of the Department of Public Works
of the City of Sacramento, in his official capacity,
Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of California, Milton L. Schwartz,
District Judge, Presiding. D.C. No. CV 99-0497 MLS

Argued and Submitted: March 12, 2002
Filed: June 12, 2002

Before HUG, CUDAHY* and TASHIMA, Circuit Judges.

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* The Honorable Richard D. Cudahy, United States Circuit Judge for the Seventh Circuit, sitting by designation.

Laurence W. Paradis, Melissa W. Kasnitz, Disability Rights Advocates, Oakland, CA, for the plaintiffs-appellants.

Gerald C. Hicks, Deputy City Attorney, Sacramento, CA, for the defendants-appellees.

Kevin Russell, Department of Justice, Washington, DC, for amicus curiae United States of America.

Gregory F. Hurley, Kutak Rock LLP, Newport Beach, CA, for amici curiae National League of Cities and 76 California cities.

Janice M. Kroll, Munger, Tolles & Olson LLP, Los Angeles, CA, for amicus curiae Western Law Center for Disability Rights.

OPINION

TASHIMA, Circuit Judge.

We must decide whether public sidewalks in the City of Sacramento are a service, program, or activity of the City within the meaning of Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132, or § 504 of the Rehabilitation Act, 29 U.S.C. § 794. We hold that they are and, accordingly, that the sidewalks are subject to program accessibility regulations promulgated in furtherance of these statutes. We therefore reverse the order of the district court and remand for further proceedings. We have jurisdiction pursuant to 28 U.S.C. § 1292(b).

BACKGROUND

Appellants, various individuals with mobility and/or vision disabilities, commenced this class action against the City of Sacramento. Appellants alleged that the City violated the ADA and the Rehabilitation Act by failing to install curb ramps in

newly-constructed or altered sidewalks and by failing to maintain existing sidewalks so as to ensure accessibility by persons with disabilities.[1] The parties stipulated to the entry of an injunction regarding the curb ramps; however, they did not reach agreement on the City's obligation to remove other barriers to sidewalk accessibility, such as benches, sign posts, or wires.

The parties filed motions for summary judgment and summary adjudication on the issue of whether sidewalks are a service, program, or activity within the meaning of the ADA and are therefore subject to the program accessibility regulations, found at 28 C.F.R. §§ 35.149-35.151. The district court denied Appellants' motion for partial summary adjudication and granted in part the City's partial motion for summary judgment. It held that the public sidewalks in Sacramento are not a service, program, or activity of the City and, accordingly, are not subject to the program access requirements of either the ADA or the Rehabilitation Act. Because that holding obviated the need for trial,[2] the district court certified the issue for interlocutory appeal, pursuant to 28 U.S.C. § 1292(b), which we granted.

STANDARD OF REVIEW

The interpretation of a statute is a question of law subject to de novo review. *Bay Area Addiction Research & Treatment,*

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[1] Appellants also alleged violations of California law that are not at issue on this appeal.

[2] Appellants represented to the district court that a holding that sidewalks are not a service or program negated their theory of the case, and that they had no interest in litigating a case in which they would be required to identify "every other discrete public activity that goes on" at a facility in order to invoke the accessibility requirements.

Inc. v. City of Antioch, 179 F.3d 725, 730 (9th Cir.1999) ("*BAART*").

DISCUSSION

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[3] 42 U.S.C. § 12132. Similarly, § 504 of the Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). One form of prohibited discrimination is the exclusion from a public entity's services, programs, or activities because of the inaccessibility of the entity's facility – thus, the program accessibility regulations at issue here.

The access requirements are set forth in 28 C.F.R. §§ 35.149- 35.151.[4] Section 35.150 requires a public entity to "operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150(a). The public entity is required to develop a transition plan for making structural changes to facilities in order to make its programs accessible. *Id.* at § 35.150(d)(1). The regulation also requires the transition plan to include a

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[3] The City of Sacramento is a public entity for purposes of Title II. *See* 42 U.S.C. § 12131(1).

[4] Section 35.149 is the general prohibition against discrimination, § 35.150 governs the accessibility of existing facilities, and § 35.151 governs the accessibility of new construction and alterations.

schedule for providing curb ramps to make pedestrian walkways accessible.[5] *Id.* at § 35.150(d)(2). Section 35.151 similarly requires newly-constructed or altered roads and walkways to contain curb ramps at intersections. 28 C.F.R. § 35.151(e).

The district court's order was based on its conclusion that sidewalks are not a service, program, or activity of the City. Rather than determining whether each function of a city can be characterized as a service, program, or activity for purposes of Title II, however, we have construed "the ADA's broad language [as] bring[ing] within its scope 'anything a public entity does.'" *Lee v. City of Los Angeles,* 250 F.3d 668, 691 (9th Cir.2001) (quoting *Yeskey v. Pa. Dep't of Corr.,* 118 F.3d 168, 171 (3d Cir.1997), *aff'd,* 524 U.S. 206, 118 S. Ct. 1952, 141 L.Ed.2d 215 (1998)); *see also Johnson v. City of Saline,* 151 F.3d 564, 569 (6th Cir.1998) (finding that "the phrase 'services, programs, or activities' encompasses virtually everything that a public entity does"); *Innovative Health Sys., Inc. v. City of White Plains,* 117 F.3d 37, 45 (2d Cir.1997) (reasoning that the phrase "programs, services, or activities" is "a catch-all phrase that prohibits all discrimination by a public entity, regardless of the context"), *superseded on other grounds, Zervos v. Verizon New York, Inc.,* 252 F.3d 163, 171 n. 7 (2d Cir.2001). Attempting to distinguish which public functions are services, programs, or activities, and which are not, would disintegrate

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[5] The regulation provides:

> If a public entity has responsibility or authority over streets, roads, or walkways, its transition plan shall include a schedule for providing curb ramps or other sloped areas where pedestrian walks cross curbs, giving priority to walkways serving entities covered by the Act, including State and local government offices and facilities, transportation, places of public accommodation, and employers, followed by walkways serving other areas.

28 C.F.R. § 35.150(d)(2).

into needless "hair-splitting arguments." *Innovative Health Sys.*, 117 F.3d at 45. The focus of the inquiry, therefore, is not so much on whether a particular public function can technically be characterized as a service, program, or activity, but whether it is "'a normal function of a governmental entity.'" *BAART,* 179 F.3d at 731 (quoting *Innovative Health Sys.*, 117 F.3d at 44). Thus, we have held that medical licensing is a service, program, or activity for purposes of Title II, *Hason v. Med. Bd.*, 279 F.3d 1167, 1173 (9th Cir.2002), as is zoning, *BAART,* 179 F.3d at 731, and parole hearings, *Thompson v. Davis,* 282 F.3d 780, 786-87 (9th Cir.2002). *See also Johnson,* 151 F.3d at 569-70 (reasoning that the word "'activities,' on its face, suggests great breadth and offers little basis to exclude any actions of a public entity," and thus holding that a contract to operate the city's public access cable station was an activity within the meaning of Title II); *Innovative Health Sys.*, 117 F.3d at 44 (holding that the ADA and the Rehabilitation Act encompass zoning decisions because zoning is "a normal function of a governmental entity").

In keeping with our precedent, maintaining public sidewalks is a normal function of a city and "without a doubt something that the [City] 'does.'" *Hason,* 279 F.3d at 1173. Maintaining their accessibility for individuals with disabilities therefore falls within the scope of Title II.

This broad construction of the phrase, "services, programs, or activities," is supported by the plain language of the Rehabilitation Act because, although the ADA does not define "services, programs, or activities," the Rehabilitation Act defines "program or activity" as "all of the operations of" a qualifying local government. 29 U.S.C. § 794(b)(1)(A). The legislative history of the ADA similarly supports construing the language generously, providing that Title II "essentially simply extends the anti-discrimination prohibition embodied in section 504 [of the Rehabilitation Act] to *all actions of state and local governments.*" H.R.Rep. No. 101-485(II), at 84 (1990),

reprinted in 1990 U.S.C.C.A.N. 303, 367 (emphasis added); *see also id.* at 151, *reprinted in* 1990 U.S.C.C.A.N. 303, 434 ("Title II ... makes *all activities* of State and local governments subject to the types of prohibitions against discrimination ... included in section 504 ....") (emphasis added). In fact, the ADA must be construed "broadly in order to effectively implement the ADA's fundamental purpose of 'provid[ing] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.'" *Hason,* 279 F.3d at 1172 (quoting *Arnold v. United Parcel Serv., Inc.,* 136 F.3d 854, 861 (1st Cir.1998)) (alteration in the original).

Requiring the City to maintain its sidewalks so that they are accessible to individuals with disabilities is consistent with the tenor of § 35.150, which requires the provision of curb ramps, "giving priority to walkways serving" government offices, "transportation, places of public accommodation, and employers," but then "followed by walkways serving other areas." 28 C.F.R. § 35.150(d)(2). Section 35.150's requirement of curb ramps in all pedestrian walkways reveals a general concern for the accessibility of public sidewalks, as well as a recognition that sidewalks fall within the ADA's coverage, and would be meaningless if the sidewalks between the curb ramps were inaccessible.

Moreover, the conclusion that sidewalks are subject to the accessibility regulations is the position taken by the Department of Justice ("DOJ"), the agency responsible for issuing the regulations. *See* 42 U.S.C. § 12134 (requiring the Attorney General to promulgate regulations implementing § 12132). An agency's interpretation of its own regulation is entitled to deference when the language of the regulation is ambiguous and the interpretation is not plainly erroneous or inconsistent with the regulation. *Auer v. Robbins,* 519 U.S. 452, 461, 117 S. Ct. 905, 137 L.Ed.2d 79 (1997); *see also Alhambra Hosp. v. Thompson,* 259 F.3d 1071, 1074 (9th Cir.2001) ("The 'agency's interpretation must be given controlling weight unless it is

plainly erroneous or inconsistent with the regulation.'") (quoting *Thomas Jefferson Univ. v. Shalala,* 512 U.S. 504, 512, 114 S. Ct. 2381, 129 L.Ed.2d 405 (1994)). The regulation is ambiguous because, while it does not specifically address the accessibility of sidewalks, it does address curb ramps. The curb ramps, however, could not be covered unless the sidewalks themselves are covered. The DOJ's interpretation of its own regulation, that sidewalks are encompassed by the regulation, is not plainly erroneous or inconsistent with the regulation. We therefore defer to the interpretation of the DOJ under *Auer.*

CONCLUSION

Title II's prohibition of discrimination in the provision of public services applies to the maintenance of public sidewalks, which is a normal function of a municipal entity. The legislative history of Title II indicates that all activities of local governments are subject to this prohibition of discrimination. This conclusion is also supported by the language of § 35.150, which requires the provision of curb ramps in order for sidewalks to be accessible to individuals with disabilities. The order of the district court accordingly is reversed and the case remanded for further proceedings.[6]

REVERSED and REMANDED.

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[6] At trial, the City will have the opportunity to present evidence concerning any "undue financial and administrative burdens," pursuant to § 35.150(a)(3), an issue which it raises on this appeal, but which we do not address.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JOAN BARDEN, SUSAN BARNHILL, JEFFREY EVANS, TONY MARTINEZ, BRENDA PICKERN, JEFF THO, SUZANNE PITTS VALTERS, MITCH WATKINS, and all others similarly situated,

Plaintiffs, Case No. CIV-S-99-497 MLS/JFM

v. CLASS ACTION

CITY OF SACRAMENTO and MIKE KASHIWAGI, Director of the Department of Public Works of the City of Sacramento, in his Official Capacity

Defendants. [proposed] ORDER

On February 16, 2001, this Court heard oral arguments on the parties' cross motions seeking a determination of whether the system of public sidewalks throughout the City of Sacramento constitutes a separate "program, service or activity" of a public entity, thus subjecting such sidewalks to the program access requirements of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973. Upon review of all the briefing and evidence submitted to the Court, and the arguments of the parties, this Court finds, for reasons stated in open court, that such sidewalks are not a program, service or activity of the City of Sacramento, and thus are not subject to the program access requirements of the ADA or Section 504 of the Rehabilitation Act. Based on this finding, Defendants' Second Partial Motion for Summary Judgment is GRANTED

IN PART,[1] and Plaintiffs' Motion for Partial Summary Adjudication is DENIED.

This Court further finds that this order involves a controlling question of law, as to which there is substantial ground for difference of opinion, and that an immediate appeal from the order may materially advance the ultimate termination of this litigation. The matter is therefore hereby CERTIFIED for appeal pursuant to 28 U.S.C. § 1292(b).

In order to allow the parties to effectively and efficiently pursue an appeal, the pending trial and pretrial dates in this action are VACATED, and all further proceedings before this court are STAYED, except for enforcement of the Stipulated Injunctive Relief Order filed on February 20, 2001.

IT IS SO ORDERED.

DATED: March 7, 2001

The Hon. Milton L. Schwartz
U.S. District Court Judge

[1] Defendants' motion is granted to the extent it addresses the issue of "program access" as it relates to sidewalks. The remaining portion of the motion, addressing the adequacy of the City's Transition Plan relating to curb ramps, has been separately withdrawn as part of a Stipulated Injunctive Relief Order filed on February 20, 2001.

APPENDIX C

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JOAN BARDEN, SUSAN BARNHILL, JEFFREY EVANS, TONY MARTINEZ, BRENDA PICKERN, JEFF THOM, SUZANNE FITTS VALTERS, MITCH WATKINS, and all others similarly situated,

Plaintiffs, Case No. CIV-S-99-497 MLS/JFM

CLASS ACTION

v.

CITY OF SACRAMENTO and MIKE KASHIWAGI, Director of the Department of Public Works of the City of Sacramento, in his Official Capacity,

Defendants. **STIPULATION AND ~~[proposed]~~ INJUNCTIVE RELIEF ORDER CONCERNING A TRANSITION PLAN FOR CURB RAMPS AND PROGRAM ACCESS REGARDING CURB RAMPS**

The parties to this action, through counsel, hereby stipulate to entry of the following proposed Injunctive Relief Order. Based on this stipulation, the parties request that the Court enter this proposed Order.

Dated: 2-15-01 DISABILITY RIGHTS ADVOCATES

By: _____
Laurence W. Paradis
Attorneys for Plaintiffs

Dated: Feb 16, 2001 OFFICE OF THE CITY ATTORNEY

By: _____
Gerald C. Hicks
Attorneys for Defendants

[proposed] STIPULATED INJUNCTIVE RELIEF ORDER

This Stipulated Injunctive Relief Order is intended to resolve certain claims under state and federal disability laws by the Named Plaintiffs and the class (hereafter collectively referred to as "Plaintiffs") for equitable relief concerning curb ramps at issue in this action.

Based upon the stipulation of the parties, and for good cause shown. IT IS HEREBY ORDERED that:

1. In order to meet the requirements of state and federal law, including the Americans with Disabilities Act, concerning curb ramps within the City of Sacramento's public rights of way, Defendants shall implement the City of Sacramento ADA Transition Plan for Curb Ramps, attached hereto as Exhibit A, with the clarifications set forth below.

2. Notwithstanding the statement at Section 3.1.2 of the ADA Transition Plan for Curb Ramps (page 8) that the City of Sacramento has no obligation under Title II of the ADA to provide access to sidewalks other than to provide curb ramps, the issue of the obligation and/or extent to which federal and/or state law may require cities to address barriers other than inadequate or nonexistent curb ramps which affect the accessibility of sidewalks is not resolved. Plaintiffs' claims and defendants' defenses regarding such claims remain pending in this litigation as set forth below.

3. Notwithstanding the statement at Section 3.1.3 of the ADA Transition Plan for Curb Ramps (page 8) that compliant curb ramps will be provided "where they are missing and necessary for access to sidewalks", the City's obligation to install 1500 curb ramps annually (or 1000 curb ramps annually if Measure A is not renewed and no equivalent

replacement funding is provided to the Department of Public Works) will continue until compliant curb ramps are provided at all areas where improved pedestrian walkways intersect streets.

4. Fiscal year 2000-2001 shall be considered the first year for installation of curb ramps under the Transition Plan.

5. The question of what constitutes a legal design for compliant curb ramps is not resolved by this stipulated Injunction Relief Order. This issue remains to be adjudicated in this action.

6. While a full survey of all curb ramps within the City of Sacramento's public rights-of-way is ongoing, curb ramps will be installed primarily within the Downtown Sacramento area, except for ramps being installed along streets that have been or will be overlaid. The City shall make its best efforts to ensure that the full survey is completed no later than May 15, 2001.

7. As part of the full survey, all locations where curb ramps must be installed or repaired shall be given a priority number which matches the prioritization criteria set forth at Section 3.1.5 of the ADA Transition Plan for Curb Ramps (pages 10-13). After the completion of the full survey, defendants shall use the priority numbers to determine the sequence for installation of curb ramps, except that a portion of the annual curb ramp installation work will ensure that curb ramps are provided along streets that have been or will be overlaid, and requests made by individuals for installation of ramps shall be given priority, as set forth in the plan, notwithstanding the prioritization number assigned in the full survey.

8. The full survey will include data regarding the gutter slope at each curb ramp. For those curb ramps which were

surveyed in the prior partial survey referenced in the Transition Plan and which are located at intersections serving government facilities and/or places of public accommodation, a further inspection will take place as part of the full survey to obtain data regarding the gutter slope and evaluate whether reconstruction is necessary and if so, what priority to assign such reconstruction work.

9. In reviewing survey data to determine whether existing curb ramps must be reconstructed and/or in establishing priorities for reconstruction, the slope of the curb ramp will be established by use of the average of measurements made by placing a "smart level" at a minimum of three locations along the sloped area of the ramp; however, if a portion of a ramp is substantially steeper than the other areas of the ramp due to broken concrete or any other cause, the slope will be recorded for the steepest area of such ramp. In no case shall the slope be calculated based on the ratio of rise to run at a curb ramp.

10. Defendants will provide class counsel with the supplemental survey data, and the prioritization assignments based on the full survey, no later than June 30, 2001.

11. While the Transition Plan is being implemented (the "implementation period"), the City of Sacramento will provide class counsel with an annual prospective plan (the "annual schedule") identifying curb ramps that it expects to construct during each fiscal year beginning with FY 2001-2002. The City of Sacramento will also provide class counsel with all information currently available about curb ramps that have been and/or will be installed in FY 2000-2001, with such information to be provided no later than April 15, 2001. In addition, the City of Sacramento will provide class counsel with a semi-annual report (the "semi-annual report") identifying locations where curb

ramps were in fact, installed over the course of each preceding half-year. The annual schedule shall be provided at the beginning of each fiscal year, and a semi-annual shall be provided each year no later than February 15 (for the work done in the first half of the fiscal year) and August 15 (for the work done in the second half of the fiscal year). The first semi-annual report will be provided no later than August 15, 2001. In the future, the City of Sacramento intends to provide the information contained in the annual schedule and the semi-annual reports through the City's ADA internet web page along the schedule set forth above, the City's obligation to provide this information directly to class counsel will cease. If, for any reason, this information fails to become available or ceases to be available on the City's ADA web page, the City's obligation to provide this information will continue or revive.

12. Defendants will make their best efforts to ensure that curb ramps constructed within the City of Sacramento during the implementation period meet all applicable state and federal access requirements.

13. Upon entry of this Order, that portion of Defendants' Second Partial Motion for Summary Judgement concerning the adequacy of the City of Sacramento ADA Transition Plan for Curb Ramps shall be WITHDRAWN. The remaining portion of Defendants' Second Partial Motion for Summary Judgement concerning the extent to which the program access requirement of the ADA may be applicable to sidewalks, as well as Plaintiffs' Motion for Summary Adjudication That Sidewalks Are Covered by Program Access Requirements and Plaintiffs' Motion for Leave to File a Second Amended Complaint, shall be heard as scheduled on February 16, 2001 or such other date and time as the Court may direct.

14. This Order hereby resolves all of Plaintiffs' Claims for equitable relief as set forth in the First Amended Complaint based on allegations that: (i) defendants have violated the ADA in that they have failed to create an appropriate transition plan regarding curb ramps; (ii) defendants have violated the "program access" requirements of the ADA as they pertain to curb ramps; (iii) defendants have violated the "program access" requirements of § 504 of the Rehabilitation Act of 1973 as they pertain to curb ramps; (iv) defendants have violated Cal. Civ. Code § 54 *et seq.* and Cal. Civ. Code § 51 *et seq.* to the extent that such claims require creation of an appropriate transition plan and provision of program access pertaining to curb ramps; and (v) defendants have violated Cal. Gov't Code § 4450 *et seq.* to the extent that such claim requires creation of an appropriate transition plan and provision of program access pertaining to curb ramps. The Court hereby finds that the resolution of such claims, as set forth herein, is fair and reasonable. None of the other claims set forth in the First Amended Complaint are affected by this Order.

15. If the Court grants plaintiffs' pending motion for leave to amend the complaint and allows plaintiffs to file an amended complaint adding claims under Cal. Gov't Code § 11135 *et seq.*, plaintiffs shall not pursue any claim under Cal. Gov't Code § 11135 *et seq.* alleging that defendants have an obligation to create an appropriate transition plan and provide program access pertaining to curb ramps.

16. The Court shall maintain jurisdiction over all claims that remain pending in this action. The Court shall also maintain jurisdiction to enforce the terms of this Stipulated Injunctive Relief Order during the implementation period.

IT IS SO ORDERED.

DATED: February 20, 2001

By: s/
MILTON L. SCHWARTZ
United States District Court Judge

APPENDIX D

[File-stamp Omitted]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOAN BARDEN; SUSAN BARNHILL; JEFFREY EVANS; TONY MARTINEZ; BRENDA PICKERN; JEFF THOM; SUZANNE FITTS VALTERS; MITCH WATKINS, and all others similarly situated,

Plaintiffs-Appellants,

v.

CITY OF SACRAMENTO; MIKE KASHIWAGI, Director of the Department of Public Works of the City of Sacramento, in his official capacity,

Defendants-Appellees.

No. 01-15744

DC No. CV 99-0497 MLS

ORDER

Before: HUG, CUDAHY*, and TASHIMA, Circuit Judges.

The panel has voted to deny the petition for panel hearing. Judge Tashima votes to deny the petition for rehearing en banc and Judges Hug and Cudahy so recommend. The full court has

---

* Honorable Richard D. Cudahy, United States Circuit Judge for the Seventh Circuit, sitting by designation.

been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. *See* Fed. R. App. P.35(f).

The petition for panel rehearing and the petition for rehearing en banc are denied.

APPENDIX E

The Rehabilitation Act of 1973, as amended, provides in pertinent part:

29 U.S.C. § 705(20):

Individual with a disability

* * *

(B) Certain programs; limitations on major life activities

Subject to subparagraphs (C), (D), and (E), the term "individual with a disability" means, for purposes of * * * [29 U.S.C. § 794] , any person who –
(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities;

(ii) has a record of such impairment; or

(iii) is regarded as having such an impairment.

29 U.S.C. § 794:

Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations

No otherwise qualified person with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity

receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. * * *

(b) "Program or activity" defined

For purposes of this section, the term "program or activity" means all of the operations of –

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency[,] * * * system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship –

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

* * *

29 U.S.C. § 794a:

Remedies and attorney fees

(a) * * *

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C. § 2000d et seq.] shall be avalable to any person aggrieved by an act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

The Americans with Disabilities Act of 1990, as amended, provides in pertinent part:

Subchapter II – Public Services

PART A – PROHIBITION AGAINST DISCRIMINATION AND OTHER GENERALLY APPLICABLE PROVISIONS

42 U.S.C. § 12131:

Definitions

As used in this subchapter:

(1) Public entity

The term "public entity" means –

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) any department, agency, special purpose district, or other instrumentality of a State of States or local government; * * *

(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual who, with or without reasonable modification to the rules, policies, or practices, the removal of architectural, communications, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12132:

Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such

disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12133:

Enforcement

The remedies, procedures, and rights set forth in Section 794a of title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

42 U.S.C. § 12134:

Regulations

(a) In general

Not later than 1 year after July 26, 1990, the Attorney General shall promulgate rgulations in an accessible format that implement this part. * * *

(b) Relationship to other regulations

Except for "program accessibility, existing facilities", and "communications", regulations under subsection (a) of this section shall be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 794 of Title 29. With respect to "program accessibility, existing facilities", and "communications", such regulations shall be consistent with regulations and

analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under section 794 of Title 29.

(c) Standards

Regulations under subsection (a) of this section shall include standards applicable to facilities and vehicles covered by this part, other than facilities, stations, rail passenger cars, and vehicles covered by part B of this chapter. Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204(a) of this title.

PART B – ACTIONS APPLICABLE TO PUBLIC TRANSPORTATION PROVIDED BY PUBLIC ENTITIES CONSIDERED DISCRIMINATORY

* * *

42 U.S.C. § 12146:

New facilities

For purposes of section 12132 of this title and section 794 of Title 29, it shall be considered discrimination for a public entity to construct a new facility to be used in the provision of designated public transportation services unless such facility is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

42 U.S.C. § 12147:

Alteration of existing facilities

(a) General rule

With respect to alterations to an existing facility or part thereof used in the provision of designated public transportation services that affect or could affect the usability of the facility or part thereof, it shall be considered discrimination, for purposes of section 12132 of this title and section 794 of Title 29, for a public entity to fail to make such alterations (or to ensure that the alterations are made) in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon the completion of such alterations. * * *

The Department of Justice's regulations relating to the ADA provide in pertinent part:

28 C.F.R. § 35.104:

For purposes of this part, the term –

* * *

Facility means all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located.

* * *

Subpart D – Program Accessibility

28 C.F.R. § 35.149:

Discrimination prohibited.

Except as otherwise provided in § 35.150, no qualified individual with a disability shall, because a public entity's facilities are inaccessible to or unusable by individuals with disabilities, be excluded from participation in, or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

28 C.F.R. § 35.150:

Existing Facilities.

(a) *General.* A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. This paragraph does not –

(1) Necessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities;

* * *

(3) Require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens. In those circumstances where personnel of the public entity believe that the proposed action would * * * result in undue financial and administrative burdens, a public

entity has the burden of proving that compliance with § 35.150(a) of this part would result in such * * * burdens. * * * If such action would result in * * * such burdens, a public entity shall take any other action that would not result in * * * such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity.

(b) *Methods* – (1) *General.* A public entity may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternative accessible sites, alteration of existing sites facilities and construction of new facilities, * * * or any other methods that result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities. A public entity is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. A public entity, in making alterations to existing buildings, shall meet the accessibility requirements of § 35.151. * * *

* * *

(c) *Time period for compliance.* Where structural changes in facilities are undertaken to comply with the obligations established under this section, such changes shall be made within three years of January 26, 1992, but in any event as expeditiously as possible.

(d) *Transition plan.*

(1) In the event that structural changes in facilities will be undertaken to achieve program accessibility, a public entity that employs 50 or more persons shall develop,

within six months of January 26, 1992, a transition plan setting forth the steps necessary to complete such changes. * * *

(2) If a public entity has responsibility or authority over streets, roads, or walkways, its transition plan shall include a schedule for providing curb ramps or other sloped areas where pedestrian walks cross curbs, giving priority to walkways serving entities covered by the Act, including State and local government offices and facilities, transportation, places of public accommodation, and employers, followed by walkways serving other areas.

(3) The plan shall, at a minimum –
(i) Identify physical obstacles in the public entity's facilities that limit the accessibility of its programs or activities to individuals with disabilities;
(ii) Describe in detail the methods that will be used to make the facilities accessible;
(iii) Specify the schedule for taking the steps necessary to achieve compliance with this section * * * ; and
(iv) Indicate the official responsible for implementation of the plan.

28 C.F.R. § 35.151:

New construction and alterations.

(a) *Design and construction.* Each facility or part of a facility contructed by, on behalf of, or for the use of a public entity shall be designed and contructed in such manner that the facility or part of the facility is readily accessible and usable by individuals with disabilities, if the construction was commenced after January 26, 1992.

(b) *Alteration*. Each facility or part of a facility altered by, on behalf of, or for the use of a public entity in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities, if the alteration was commenced after January 26, 1992.

(c) *Accessibility standards*. Design, construction, or alteration of facilities in conformance with the Uniform Federal Accessibility Standards (UFAS) (appendix A to 41 CFR part 101-19.6) or with the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG) (appendix A to 28 CFR part 36) shall be deemed to comply with the requirements of this section with respect to those facilities * * * .

* * *

(e) *Curb ramps*. (1) Newly contructed or altered streets, roads, and highways must contain curb ramps or other sloped areas at any intersection having curbs or other barriers to entry from a street level pedestrian walkway.

(2) Newly contructed or altered street level pedestrian walkways must contain curb ramps or other sloped areas at intersections to streets, roads, or highways.

APPENDIX F

DEC 21 1995

The Honorable Charles H. Taylor
U.S. House of Representatives
231 Cannon Building
Washington, D.C. 20515-3311

Dear Congressman Taylor:

This letter is in response to your inquiry on behalf of your constituent, xx _____, regarding the broken sidewalk at Central Elementary School in Haywood County, North Carolina. xx _____ wishes to know whether the school could be required to repair the sidewalk under the Americans with Disabilities Act of 1990 (ADA).

Title II of the ADA prohibits discrimination against qualified individuals with disabilities on the basis of disability in all programs, activities, and services provided by or on behalf of State and local governments. The Department of Justice's title II regulation prohibits a public entity from denying the benefits of such programs, activities, and services to qualified individuals with disabilities because the entity's facilities are inaccessible to or unusable by individuals with disabilities.

A public entity is required to provide "program access," i.e., the entity is required to operate each service, program, or activity it provides so that, when viewed in its entirety, the service, program, or activity is readily accessible to and usable by individuals with disabilities. Providing program access does not necessarily require a public entity to make each of its facilities fully accessible. For example, program access can be achieved by the relocation of services from inaccessible to

accessible buildings or by the assignment of aides to program beneficiaries. In addition, a public entity is not required to take any action that it can demonstrate would result in a fundamental alteration in the nature of its services, programs, or activities or in undue financial and administrative burdens.

cc: Records, Chrono, Wodatch, McDowney, Milton, FOIA
n:\udd\milton\congress\sidewalk.tay\sc.young-parran
01-4121

-2-

With respect to the situation you describe, title II of the ADA requires public entities to maintain in operable working condition those features of facilities that are required for program access and over which the public entities have control. Therefore, if a public entity has responsibility for, or authority over, sidewalks or other public walkways, and if such sidewalks or walkways are necessary to ensure accessibility to the entity's programs, services, or activities, then the public entity has an obligation to maintain the sidewalks or walkways in usable working condition.

I hope this information is helpful to you in responding to your constituent.

Sincerely,

Bill Lann Lee
Acting Assistant Attorney General
Civil Rights Division

APPENDIX G

U.S. Department of Justice
Civil Rights Division
Washington, D.C. 20035

Office of the Assistant Attorney General MAY 14 1998

The Honorable William D. Delahunt
Member, U.S. House of Representatives
15 Cottage Avenue
Quincy, Massachusetts 02169

Dear Congressman Delahunt:

I am responding to your letter on behalf of your constituent, Mr. XXX _____ regarding whether the Americans with Disabilities Act (ADA) requires the removal of snow and maintenance of sidewalks on a city street. Please excuse our delay in responding.

The answer to this question depends on the specific circumstances. The Department of Justice regulation implementing title II of the ADA requires a public entity (such as a city) to ensure that its services, programs, and activities in existing facilities are accessible to people with disabilities. The focus of the requirement is access to services, programs, and activities, as opposed to access to physical structures. Therefore, there is no general requirement that compels a public entity to ensure that all sidewalks are free of snow.

However, if the sidewalk is part of an accessible route that is required to provide access to a covered program or activity, the public entity that provides the program would be required to ensure the sidewalk remains accessible. However, temporary interruptions in accessibility, such as those caused by snow, generally do not constitute violations of title II unless they

persist beyond a reasonable period of time. Further, only those sidewalks that are required by the ADA to be accessible and that are within the control of the city will be required to be maintained by the city.

To the extent that a public entity provides snow removal services, title II requires those services to be provided in a non-discriminatory manner. However, sidewalk snow removal by private property owners is private action not covered by title II absent some substantial involvement by the public entity. The ADA, therefore, does not generally require local governments to pass ordinances compelling property owners to remove snow from sidewalks.

(handwritten) FOIA

2

If sidewalks lead to places of public accommodation (such as stores or restaurants) covered by title III of the ADA, the owners or operators of these public accommodations may have obligations to maintain them under title III. If a sidewalk is part of a required accessible route and if the public accommodation exercises control over the sidewalk, the public accommodation may be required to keep the sidewalk accessible. As under title II, temporary interruptions to access because of snow are permissible unless they persist beyond a reasonable period of time.

I hope this information is helpful to you in responding to your constituent.

Sincerely,

Bill Lann Lee
Acting Assistant Attorney General
Civil Rights Division

No. 02-815

Supreme Court, U.S.
FILED
JAN 27 2003
OFFICE OF THE CLERK

In The

Supreme Court of the United States

CITY OF SACRAMENTO and MIKE KASHIWAGI, Director of the Department of Public Works of the City of Sacramento, in His Official Capacity,

Petitioners,

v.

JOAN BARDEN, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether the program access requirement of Title II of the Americans with Disabilities Act, 42 U.S.C. §12132, and the Rehabilitation Act of 1973, 29 U.S.C. §794, applies to public sidewalks.

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INTRODUCTION

This case asks the simple question of whether a city which owns, maintains and controls public sidewalks has any obligation under the program access requirements of the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act of 1973 ("Rehab Act") to take reasonable steps over time to remove barriers that limit access on such sidewalks for people with mobility and/or vision disabilities. Under the plain language of the statutes and regulations, as well as existing precedent from this Court and various circuit courts, the Ninth Circuit properly found that the answer is yes. This decision creates no split within the circuits, nor does it represent a break with existing precedent or a deviation from the general rules of statutory construction. This Court's review is not warranted.

STATEMENT OF THE CASE

I. STATUTORY AND REGULATORY STRUCTURE

Title II of the ADA requires public entities, including local governments, to ensure that "[n]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. §12132; *see also* 28 C.F.R. §35.130(a) (same).[1]

[1] The statutes and implementing regulations at issue in this case are set forth in the Petition for a Writ of Certiorari Appendix E ("Pet.App.") at 21a-31a.

The Rehab Act contains a similar mandate, stating that "[n]o otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . . " 29 U.S.C. §794; *see also* 28 C.F.R. §41.56 (same).

Congress has directed that Title II of the ADA be interpreted in a manner consistent with the Rehab Act. *See* 42 U.S.C. §12134(b) & 12201(a); *see also Bay Area Addiction and Treatment, Inc. v. City of Antioch ("BAART")*, 179 F.3d 725, 731 (9th Cir. 1999). The ADA does not define "services, programs or activities." However, the Rehab Act defines "program or activity" as "all of the operations of a department, agency, special purpose district, or other instrumentality of a State or of a local government." 29 U.S.C. §794(b)(1)(A).

To implement the ADA, Congress directed the Attorney General to promulgate regulations setting standards applicable to all facilities controlled by public entities. 42 U.S.C. §12134(c).[2] The preamble to these regulations explains that "Title II applies to anything a public entity does. . . . All governmental activities of public entities are covered." 28 C.F.R. pt. 35, app. A at 456. As further explained by the Department of Justice:

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[2] As the City notes, these regulations create a distinction between new facilities, which are subject to the new construction requirements, and existing facilities, which are subject to the program access requirements at issue here. *See* 28 C.F.R. §35.150 (existing facilities); and 28 C.F.R. §35.151 (new construction and alterations).

> there are two major categories of programs or activities covered by this regulation: those involving general public contact as part of ongoing operations of the entity and those directly administered by the entities for program beneficiaries and participants. Activities in the first category include communication with the public . . . *and the public's use of the entity's facilities.*

Id. (emphasis added). The implementing regulations define "facilities" to include "all or any portion of . . . roads, walks, [or] passageways" controlled by a public entity. 28 C.F.R. §35.104.

The regulations applicable to "existing facilities" also explain the scope of the program access requirement, stating that "[a] public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. §35.150(a). However, the regulations clearly state that this standard does not "[n]ecessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities." 28 C.F.R. §35.150(a)(1); *see also* 28 C.F.R. §41.57(a) (same for Rehab Act). A public entity is also not obligated "to take any action that it can demonstrate would result in . . . undue financial and administrative burdens." 28 C.F.R. §35.150(a)(3).

To guide public entities in implementing the program access standard, the Department of Justice set forth specific procedures for public entities to follow in identifying and removing barriers. The regulations detail the methods for providing program access to existing facilities, including the requirements for conducting a self-evaluation and developing a transition plan where necessary. *See* 28 C.F.R.

§35.150. This regulation also contains a specific requirement which states that "[i]f a public entity has responsibility or authority over streets, roads, or walkways, its transition plan shall include a schedule for providing curb ramps or other sloped areas where pedestrian walks cross curbs. . . . " 28 C.F.R. §35.150(d)(2).

II. NATURE OF THE BARRIERS AT ISSUE

It is not disputed that the public sidewalks within the City of Sacramento contain barriers that make the sidewalks either dangerous or completely inaccessible for people with mobility and vision disabilities. It is also not disputed that many of the sidewalk barriers at issue involve simple-to-fix problems such as benches or sign posts that block wheelchair access by narrowing the sidewalk, broken-up concrete that creates a tripping hazard for people with vision disabilities and an obstacle for people with mobility disabilities, and protruding objects that require a warning feature so that blind pedestrians can detect them with their canes. Other barriers require greater effort to remedy, such as utility poles that narrow the sidewalk and excessive cross slope conditions that make the sidewalk dangerous if not impossible to use for people with mobility disabilities.

Taken together, these types of barriers frequently make travel along the sidewalk for a person with a disability difficult and, at times, dangerous. For example, such barriers routinely force wheelchair users to travel in the street and fight for space alongside cars and trucks. The cumulative effect of sidewalk barriers is the profound limitation of the ability of people with disabilities to travel

around in the community and to conduct the basic activities of daily life.

III. HISTORY OF THE CASE AND OPINIONS BELOW

Respondents are a class of individuals with mobility and/or vision disabilities who use the sidewalks in the City of Sacramento.[3] Respondents brought this action on March 15, 1999 against the City of Sacramento, and Mike Kashiwagi, Director of the Department of Public Works of the City of Sacramento, in his Official Capacity, alleging, among other things, violations of the ADA and Rehab Act.

Respondents assert two distinct types of claims in this action concerning access to sidewalks and curb ramps in the City of Sacramento. The first type of claim involves access standards that are triggered when facilities are newly constructed or altered. These claims are not at issue here. The second type of claim involves the City's overall obligation to provide program access to its existing programs, services and activities as required by the ADA and the Rehab Act.

In addition, each of these claims is comprised of two issues: curb cuts and sidewalk barriers. Curb cuts, which are also known as curb ramps, allow people who use mobility aids to get onto and off of the sidewalk, usually at the corners. Sidewalk barriers are those barriers

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[3] The class is defined as: "all persons with mobility and/or vision disabilities who seek full and equal access pertaining to curb cuts and sidewalks in the City of Sacramento's public rights of way."

explained above that impede travel between the curb cuts for people with mobility and vision disabilities.

The parties entered into a stipulated injunction, approved by the district court in February of 2001, that resolved all issues related to curb cuts. As part of this injunction, the City agreed to install 1500 curb ramps per year pursuant to a Transition Plan developed by the City. Pet.App. C at 11a-18a.

The parties could not reach agreement, however, on the issue of whether sidewalks are a program, service or activity of the City and thus subject to program access requirements. This issue was presented in the parties' cross-motions for summary judgment and summary adjudication heard by the district court on February 16, 2001. The Court determined that sidewalks "are not a program, service or activity of the City of Sacramento, and thus not subject to the program access requirements of the ADA and Rehab Act." Pet.App. B at 9a-10a. The district court certified the decision for interlocutory review.

On June 12, 2002, the Ninth Circuit reversed, holding that "public sidewalks in the City of Sacramento are a service, program, or activity of the City within the meaning of Title II of the Americans with Disabilities Act, 42 U.S.C. §12132 [and] §504 of the Rehabilitation Act, 29 U.S.C. §794." Pet.App. A at 2a. The Ninth Circuit held that "we have construed 'the ADA's broad language [as] bring[ing] within its scope "anything a public entity does."'" *Id.* at 5a (citing *Yeskey v. Pa. Dep't of Corr.*, 118 F.3d 168, 171 (3d Cir. 1997), *aff'd*, 524 U.S. 206 (1998); *Johnson v. City of Saline*, 151 F.3d 564, 569 (6th Cir. 1998); and *Innovative Health Sys. v. City of White Plains,* 117 F.3d 37, 45 (2d Cir. 1997)). This language is derived directly from

the preamble to the ADA's implementing regulations. *See* 28 C.F.R. pt. 35, app. A at 456. The court further found that this "construction of the phrase, 'services, programs, or activities,' is supported by the plain language of the Rehabilitation Act because, although the ADA does not define 'services, programs, or activities,' the Rehabilitation Act defines 'program or activity' as 'all of the operations of a qualifying local government.'" Pet.App. A at 6a. (citing 29 U.S.C. §794(b)(1)(A)).

The Ninth Circuit determined that the language and intent of the ADA, as well as its legislative history, supported this interpretation. As the court noted, the "ADA must be construed broadly in order to effectively implement the ADA's fundamental purpose of provid[ing] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." Pet.App. A at 7a (quoting *Hason v. Medical Bd. of Cal.*, 279 F.3d 1167, 1172 (9th Cir. 2002), *cert. granted*, 123 S.Ct. 561 (Mem) (Nov. 18, 2002) (No. 02-479)[4] (quoting *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 861 (1st Cir. 1998))) (internal quotation marks omitted).

The Ninth Circuit further informed its decision by reference to the requirement contained in the implementing regulations that public entities provide curb cuts along public sidewalks. *See* 28 C.F.R. §35.150(d)(2). Relying upon this, the Ninth Circuit concluded that "curb ramps, however, could not be covered unless the sidewalks themselves

[4] The *Hason* decision was accepted for review by this Court on other grounds (Eleventh Amendment immunity).

are covered." Pet.App. A at 8a. This conclusion was advocated by the U.S. Department of Justice as *amicus* before the court. Relying on *Auer v. Robbins*, 519 U.S. 452, 461 (1997), the Ninth Circuit deferred to the Department of Justice's interpretation of its own regulation. *Id.* With this guidance, the court remanded the case for further proceedings. Pet.App. A at 8a.

The City's petition for rehearing and rehearing *en banc* at the Ninth Circuit was denied on September 5, 2002. Pet.App. D at 19a-20a.

Because this case was presented on interlocutory appeal, no trial has been held, and no evidence has been taken regarding what the City of Sacramento is required to do in order to provide program access to the system of public sidewalks. As a result, there is no evidence in the record regarding the exact extent of the barriers, or the cost of removing any such barriers. Such issues will be addressed by the district court on remand.

REASONS THE PETITION SHOULD BE DENIED

Far from conflicting with this Court's jurisprudence, the Ninth Circuit's decision in this case reaffirms the comprehensive mandate of the ADA as it has long been recognized by this Court. In addition, because the Ninth Circuit was the first court to consider the issue of whether public sidewalks are subject to the program access requirements of the ADA and Rehab Act, there is no conflict among the courts on this issue. On the broader issue of the scope of Title II of the ADA, the Ninth Circuit's decision comports with other court decisions.

Moreover, the City's petition misstates the impact of the Ninth Circuit's opinion. In order to provide program access the City must only remove barriers to the extent it can do so without creating an undue financial or administrative burden. Neither the district court nor the Ninth Circuit has addressed this issue, so it is not appropriate for review.

For these reasons, and as more fully discussed below, the petition for a writ of certiorari should be denied.

I. THERE IS NO CONFLICT IN THE COURTS ON ANY ISSUE RAISED BY THIS CASE

The City argues that the Ninth Circuit's decision in this case is in conflict with other circuits. In order to do so, the City identifies three discrete issues in the hope that it will create the appearance of a circuit split. To the extent there is any legitimate disagreement among the circuits on the issues raised by the City, those issues are not appropriate for review in this case.

For example, the City raises the issue of arrests, and cites to, *inter alia*, the Fourth Circuit's decision in *Rosen v. Montgomery County*, 121 F.3d 154 (4th Cir. 1997) (holding that Title II does not apply to arrests). However, the *Rosen* court's analysis rested on what it found to be an implied requirement of voluntariness under the ADA. *Id.* at 157. This reasoning was rejected by this Court in *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206 (1998). *See Thompson v. Davis*, 282 F.3d 780, 785 (9th Cir. 2002) (noting that the *Rosen* reasoning "has now been discredited by the Supreme Court"); *Calloway v. Boro of Glassboro Department of Police*, 89 F.Supp.2d 543, 556 (D.N.J. 2000) (noting that *Rosen* relied upon the "now discredited

reasoning that the statutory text implies voluntariness on the part of the individual"); *see also Gorman v. Bartch*, 152 F.3d 907, 912 (8th Cir. 1998) (finding that transportation of arrestee to station house is covered by Title II, and noting that pursuant to *Yeskey* covered programs and services do not need to be voluntary); *but see Hainze v. Richards*, 207 F.3d 795 (5th Cir. 2000) (holding that ADA does not apply to on-the-street response of officers involved with shooting of a suspect with mental illness).

Similarly, the City raises the issue of termination of parental rights. Respondents do not contest that the courts have struggled with the application of the ADA in the context of termination of parental rights proceedings. *See In re Doe,* 2002 WL 31341332 (Hawai'i App. Oct. 18, 2002) (holding that a termination of parental rights proceeding ("TPR") is covered by Title II, but that the ADA does not allow parents to defend a TPR proceeding on the basis that they were not provided with appropriate services to accommodate their disabilities); and *In re Antony B.*, 54 Conn.App. 463 (1999) (holding that ADA is not a defense in TPR proceedings). However, TPR cases raise unique issues concerning the intended beneficiaries of the public entity's activity – issues that simply do not apply to public sidewalks. There is no question here that the City's public sidewalks exist to benefit the general public by enabling pedestrians to safely navigate throughout the city.

Lastly, Respondents also do not contest that courts have split on the issue of whether employment claims against public entities are appropriately brought pursuant to Title I or Title II of the ADA. However, with that issue, the question is not whether public employment is covered at all, but rather which provision of the ADA appropriately

governs this area.[5] *Compare Zimmerman v. Oregon Dept. of Justice*, 170 F.3d 1169 (9th Cir. 1999) (public employment covered by Title I), *with Bledsoe v. Palm Beach Cty. Soil & Water Conservation Dist.*, 133 F.3d 816 (11th Cir. 1998) (public employment covered by Title II). Determining whether Congress intended public employment to be addressed solely by Title I of the ADA involves a focus on the overall structure of the statute and Congress's intent in setting up extensive procedural requirements for employment discrimination claims – issues that simply do not arise in addressing sidewalks provided expressly for use by the general public.

Thus, the City can point to no split among the lower courts on the issue presented in this case. Indeed, the Ninth Circuit is the only appellate court to have considered this issue.

II. THE DECISION BELOW IS CONSISTENT WITH THE DECISIONS OF THIS COURT

Contrary to the City's assertions, the Ninth Circuit's decision fully comports with the decisions of this Court. Indeed, this Court's decisions have repeatedly noted the comprehensive nature of the statutes at issue in this case.

Specifically, the decision below conforms to the standards set forth in *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206 (1998). *Yeskey* held that the programs,

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[5] Unlike the ADA, the Rehab Act is not split into separate chapters. Under the Rehab Act, therefore, employment is encompassed by the statutory provision prohibiting discrimination by covered entities. *See, e.g., Consolidated Rail Corp. v. Darrone*, 465 U.S. 621, 632 (1984).

services and activities offered by prisons are covered in the same manner as those offered by other public entities. *Id.* at 210. In so holding, this Court stated that "[m]odern prisons provide inmates with many recreational 'activities,' medical 'services,' and educational and vocational 'programs,' all of which at least theoretically benefit the prisoners (and any of which disabled prisoners could be 'excluded from participation in')." *Yeskey*, 524 U.S. at 210. This Court in *Yeskey* specifically noted that facilities provided by a prison for the use and benefit of the prisoners are clearly covered by the "program, service or activity" language. Thus, this Court observed that "[t]he prison law library, for example, is a service (and the use of it an activity)," both covered by Title II. *Id.* at 211.

The City argued below that public sidewalks are not covered by the program access requirements of the ADA or Rehab Act because they are not specifically mentioned in the statute or regulations. The same argument was made and rejected in *Yeskey*. As this Court noted, "the fact that a statute can be 'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'" *Yeskey*, 524 U.S. at 212 (citing *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1983)); *see also Gorman v. Bartch*, 152 F.3d 907, 912 (8th Cir. 1998) (citing *Yeskey*, 524 U.S. at 212) (noting in a case applying Title II to arrests that "[i]n applying Title II of the ADA to state prisons and prison services, Justice Scalia emphasized the broad language used by Congress and its choice not to include exceptions.").

Undeniably, one uses and benefits from the public sidewalk system, just as one uses and benefits from a library. In providing this clear guidance on the scope and intent of the ADA, and the multitude of situations to

which it could be applied, this Court could not have intended to establish more rights for prisoners than for disabled citizens simply trying to use their local public sidewalks.

In addition, this Court has specifically noted that the ADA was intended to counteract the segregation and isolation historically experienced by people with disabilities. In *Olmstead v. L.C.*, 527 U.S. 581, 588 (1999), this Court specifically noted that:

> Congress determined that . . .
>
> "individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, . . . failure to make modifications to existing facilities and practices, . . . [and] segregation. . . . "

527 U.S. at 588 (quoting 42 U.S.C. §§12101(5)) (noting that the ADA is the Federal government's most "recent and extensive endeavor to address discrimination against persons with disabilities."). "The statute as a whole," this Court noted, "is intended 'to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.'" *Id.* at 589 (quoting 42 U.S.C. §12101(b)(1)); *see also PGA Tour Inc. v. Martin*, 532 U.S. 661 (2001) (noting in a decision involving Title III of the ADA that one of the Act's "most impressive strengths" has been identified as its "comprehensive character") (citation omitted).

Absent the ability of people with disabilities to travel along the sidewalk, the intent of the ADA, as identified by this Court, will be forever unfulfilled. Indeed, the legislative history reaffirmed this, noting that, "[t]he employment, transportation, and public accommodation sections

[of the ADA] would be meaningless if people who use wheelchairs were not afforded the opportunity to travel on and between the streets." H.Rep 485(II), 101st Cong. 2d Sess. 84 (1990), U.S. Code Cong. & Admin. News 1990, 267, 303, 367.

Thus, the "sweeping purpose" of the ADA that this Court has long recognized will indeed be hindered should people with disabilities continue to be excluded from public sidewalks. The Ninth Circuit's decision, both in its reasoning and holding, executes the intent of the ADA as it has been identified by this Court.

III. THE DECISION BELOW IS CONSISTENT WITH THE DECISIONS OF THE OTHER CIRCUIT COURTS

Multiple lower courts have consistently utilized the natural and ordinary meanings of the words of the ADA and Rehab Act, and the implementing regulations, to evaluate the scope of these statutes. It is from the leading cases' use of the ordinary meanings that the Ninth Circuit's decision is derived.

The Third Circuit in *Yeskey v. Commonwealth of Pennsylvania Dep't of Corrections* held that Title II of the ADA applies to prisons. 118 F.3d 168, 170 (3d Cir. 1997), *aff'd, Pennsylvania Dep't of Corrections v. Yeskey,* 524 U.S. 206 (1998). In doing so, it examined the plain language of the statute. As an initial matter, it noted that "activity" means, *inter alia*, "natural or normal function or operation," and includes the "duties or function" of an "organizational unit for performing a specific function." *Id.* at 170 (quoting *Webster's Third New International Dictionary* 22 (1986)). In addition, the *Yeskey* circuit court noted that the

broad regulatory language enacted to implement Title II is intended to "appl[y] to anything a public entity does." *Id.* at 171 (quoting 28 C.F.R. p. 35, app. A, subpt. A) (internal quotation marks omitted). Based upon this broad language, the court concluded that the ADA and Rehab Act "apply to state and locally-operated correctional facilities." *Id.* at 172.

In *Innovative Health Systems, Inc v. City of White Plains,* the Second Circuit replicated this approach to determine that zoning is encompassed by the scope of Title II. 117 F.3d 37 (2d Cir. 1997), *superceded on other grounds, Zervox v. Verizon New York, Inc.*, 252 F.3d 163, 171 n.7 (2d Cir. 2001). The Second Circuit relied similarly on the dictionary definition of "activity" to determine that Title II covers the "natural or normal function[s] or operation[s]." *Innovative Health*, 117 F.3d at 44 (quoting *Webster's Third New International Dictionary* (1993)). The Second Circuit also looked to the definition contained in the Rehab Act of "all of the operations" of a public entity. *Innovative Health*, 117 F.3d at 44. Finally, as with the *Yeskey* court, the *Innovative Health* court also relied upon regulatory guidance to determine that Title II applies "anything a public entity does." *Id.* (quoting 28 C.F.R. pt. 35, app. A at 456). Thus, using the "plain meaning" of the statute, the court concluded that zoning was encompassed by Title II. *See id.* at 46.

The Ninth Circuit followed this approach to statutory interpretation in *Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725 (9th Cir. 1999) ("BAART"). In *BAART*, the Ninth Circuit followed the lead of the Second and Third Circuits and began with the ADA's text. *Id.* at 730. In doing so, the Ninth Circuit utilized the *Innovative Health* and *Yeskey* courts' determination that

Title II covered "normal function[s] of a governmental entity." *Id.* at 731.

The Ninth Circuit in *BAART* also looked at the definition contained in the Rehab Act itself, observing that the Rehab Act defines "program or activity" to mean "all of the operations of a qualifying local government." *BAART*, 179 F.3d at 731 (citing 29 U.S.C. §794(b)(1)(A)). Noting that Congress instructed that the ADA is to be interpreted consistently with the Rehabilitation Act, the *BAART* court interpreted Title II's coverage in light of that definition. *BAART*, 179 F.3d at 731. Consequently, the Ninth Circuit, like the Second Circuit, concluded that zoning was regulated by the ADA.

This general approach to interpretation of Title II of the ADA and the Rehab Act has been adopted in other Circuits. *See, e.g., Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 782 (7th Cir. 2002) ("Although the ADA does not explicitly define 'services, programs, or activities,' the regulations promulgated pursuant to the act state that 'title II applies to anything a public entity does.'"); and *Johnson v. City of Saline*, 151 F.3d 564, 569-70 (6th Cir. 1998) (holding that Title II applies to virtually everything a public entity does).

A variety of other cases are remarkably uniform in their decisions reaffirming the comprehensive nature of Title II. These cases have consistently applied Title II to anything a public entity does or provides, vis-a-vis the public. *See, e.g., Washington v. Indiana High School Athletic Ass'n*, 181 F.3d 840, 846-847 (7th Cir. 1999) (state high school athletic association's eight-semester eligibility rule); *Frederick L. v. Dept. of Public Welfare*, 157 F.Supp.2d 509, 538-539 (E.D. Pa. 2001) (state's failure to transfer

people with mental disabilities from state mental hospital to integrated community settings); *Access Living of Metropolitan Chicago v. Chicago Transit Authority*, 20 NDLR P 211 (N.D. Ill. 2001) (public transportation bus and train services); *Henrietta D. v. Giuliani*, 119 F.Supp.2d 181, 206 (E.D.N.Y. 2000), *appeal dismissed*, 246 F.3d 176 (city agency's distribution of federal and state public assistance benefits and services); *People of New York ex rel Spitzer v. County of Delaware*, 82 F.Supp.2d 12, 17 (N.D.N.Y 2000) (polling places); *Santiago v. Garcia*, 70 F.Supp.2d 84, 89-90 (D. Puerto Rico 1999) (territorial civil trial); *Galusha v. New York State Dept. of Environmental Conservation*, 27 F.Supp.2d 117 (N.D.N.Y. 1998) (state park agency's policy of limiting access to parks in areas); *Doe v. Stincer*, 990 F.Supp. 1427, 1430 (S.D. Fla. 1997) *vacated on grounds of organizational standing and remanded, Doe v. Stincer*, 175 F.3d 879 (11th Cir. 1999) (statutory access to medical records); *Marisol A. by Forbes v. Giuliani*, 929 F.Supp. 662, 685 (S.D.N.Y. 1996) (city's child welfare agency); *Heather K. by Anita K. v. City of Mallard*, 946 F.Supp. 1373, 1387 (N.D. Iowa 1996) (regulation of leaf burning); *Concerned Parents to Save Dreher Park Ctr. v. City of West Palm Beach*, 846 F.Supp. 986, 992 (S.D. Fla. 1994) (city's recreational program); *Civic Ass'n of Deaf of New York City, Inc. v. Giuliani*, 915 F.Supp. 622, 634-635 (S.D.N.Y. 1994) (provision of city's street alarm box system).

The Ninth Circuit's decision in this case relied heavily upon this line of cases. Pet.App. A at 3a (citing *Innovative Health Systems, Inc v. City of White Plains*, 117 F.3d 37, 45 (2d Cir. 1997), *Johnson v. City of Saline*, 151 F.3d 564, 569 (6th Cir. 1998); and *Yeskey v. Pennsylvania Dep't of Corrections*, 118 F.3d 168, 171 (3d Cir. 1997)). The City argues

that in relying upon the standards outlined above the Ninth Circuit disregarded the language of the statute, deciding that it is not necessary to determine whether something is a "program, service or activity." As the above analysis demonstrates, however, the "program, service, or activity" text of the statute itself formed the very foundation of the Ninth Circuit's decision.

In light of the language of the statute, as well as interpreting regulations and case law, the Ninth Circuit in this case determined that the system of public sidewalks squarely fits within the scope of Title II. Pet.App. A at 2a. Sidewalks are provided by the City to the public as a means for traveling safely around the City. They are furnished by the City for use by the general public. The Ninth Circuit logically found that in light of the language of the statute and regulations this is precisely the type of situation that the ADA and Rehab Act were intended to address.

IV. NO OTHER REASON JUSTIFIES THE GRANTING OF A WRIT OF CERTIORARI

Unable to point to relevant conflict among the courts, the City obfuscates the issue and uses hyperbole in an attempt to create a justification for the granting of a writ of certiorari. The City argues that "the cost of complying with the Ninth Circuit's ruling will be enormous." This argument ignores the undue burden defense, and raises issues not even addressed by the trial court.

As an initial matter, the City misstates the question presented. The question that was decided below was whether the program access requirement of Title II of the Americans with Disabilities Act, 42 U.S.C. §12132, and

Section 504 of the Rehabilitation Act, 29 U.S.C. §794, applies to sidewalks. The City now attempts to expand the issue presented beyond that at issue below, and far beyond the record in this case, by including within its petition the issue of whether unidentified "other forms of physical infrastructure owned by state or municipal governments" constitute programs, services or activities under these statutes. The City uses this expansion in order to exaggerate the impact of this decision, citing to millions of miles of roads that the City argues would need to be retrofitted. However, roads and other types of public "infrastructure" have never been at issue in this case.

In reality, the question presented to and decided by the court below was much more straightforward. Is a system of public sidewalks, provided to the public for use by the public, a program, service, or activity, under these statutes? The Ninth Circuit found, based on the language and intent of the statute, as well as implementing regulations and case law, that the answer is yes.

In contrast to the City's representations, moreover, the program access standard is distinctly limited. Under this standard "[a] flexible concept of accessibility is employed. . . . " *Kinney v. Yerusalem*, 9 F.3d 1067, 1071 (3d Cir. 1993). Specifically, the implementing regulations for Title II state that a public entity is not required "to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." 28 C.F.R. §35.150(a)(3).

The Ninth Circuit specifically noted in its decision that the City will have the opportunity to present evidence regarding the undue burden defense. Specifically, the court

stated that "[a]t trial, the City will have the opportunity to present evidence concerning any 'undue financial and administrative burdens,' pursuant to §35.150(a)(3). . . . " Pet.App. A at 8a n.6.

Because this is an interlocutory appeal, the district court has not even been presented with an opportunity to address the issue of what exactly the City must do to provide program access along the public sidewalk system. On remand, the court below will have ample opportunity to address the financial and administrative impact of any action required to provide access to the City's sidewalks. The parties will present evidence to demonstrate what the City can and cannot reasonably do in order to remedy the barriers at issue. *See, e.g.*, *Onishea v. Hopper*, 171 F.3d 1289 (11th Cir. 1999) (evaluating impact on budget of requested accommodations). In a similar, yet distinct context this Court has already set forth guidance regarding the type of balancing inherent in the ADA's standards. *See Olmstead v. L.C.*, 527 U.S. 581, 605 (1999) (explaining that the state would not be required to shut all institutions, but rather could create an "effectively working plan" that "moved at a reasonable pace," to place people in less restrictive settings). The trial court might conclude, for example, after examining the evidence presented, that the City can reasonably allocate a certain amount of funds each year for addressing sidewalk barriers, in the same fashion as the City has already agreed to do for addressing curb cuts. Such a ruling would enable the City to spread the barrier removal work over a period of decades, thus preventing the undue burden on the City's overall resources.

CONCLUSION

For the foregoing reasons, Respondents oppose the petition for a writ of certiorari.

Respectfully Submitted,

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No. 02-815

IN THE

Supreme Court of the United States

CITY OF SACRAMENTO AND MIKE KASHIWAGI, DIRECTOR OF THE DEPARTMENT OF PUBLIC WORKS OF THE CITY OF SACRAMENTO, IN HIS OFFICIAL CAPACITY,

Petitioners,

v.

JOAN BARDEN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CALIFORNIA CITIES AND JOINT POWERS AUTHORITIES; THE CITY OF DENVER, COLORADO; THE TERRITORY OF GUAM; AND THE COMMONWEALTH OF PUERTO RICO AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Pursuant to Rule 37 of the Rules of the Supreme Court of the United States, the California Cities of Agoura Hills, Alameda, Albany, Aliso Viejo, Alturas, Amador City, American Canyon, Anaheim, Antioch, Arcadia, Arcata, Arvin, Avalon, Avenal, Bakersfield, Baldwin Park, Barstow, Beaumont, Bellflower, Bell Gardens, Belmont, Benicia, Big Bear Lake, Brentwood, Burlingame, Calexico, California City, Calistoga, Camarillo, Campbell, Capitola, Carlsbad, Carmel-By-the-Sea, Ceres, Chino Hills, Chula Vista, City of King, Clayton, Chowchilla, Clovis, Coalinga, Colma, Colton, Commerce, Concord, Corona, Cypress, Danville, Del Mar, Del Rey Oaks, Diamond Bar, Dinuba, Dublin, El Centro, Elk Grove, Emeryville, Encinitas, Etna, Eureka, Exeter, Firebaugh, Fontana, Fort Bragg, Fortuna, Foster City, Fountain Valley, Fowler, Fremont, Fresno, Galt, Garden Grove, Glendale, Gilroy, Glendora, Grand Terrace, Grass Valley, Gridley, Hanford, Hayward, Hemet, Hermosa Beach, Hollister, Holtville, Hughson, Huntington Beach, Huntington Park, Huron, Indian Wells, Irvine, Irwindale, Isleton, Jackson, Kerman, Laguna Beach, Lakeport, Lakewood, Lancaster, La Puente, Lathrop, La Mesa, La Verne, Lemoore, Lemon Grove, Lindsey, Livermore, Lodi, Long Beach, Loomis, Los Alamitos, Los Altos, Los Banos, Los Gatos, Lynwood, Manteca, Marina, Marysville, Mendota, Merced, Millbrae, Mill Valley, Mission Viejo, Monrovia, Montclair, Monterey, Montebello, Monterey Park, Moreno Valley, Moorpark, Moraga, Mountain View, Mt. Shasta, Murrieta, Napa, Newark, Newport Beach, Norco, Novato, Oakley, Ontario, Orange, Orange Cove, Orinda, Oroville, Pacific Grove, Palm Desert, Palm Springs, Paramount, Perris, Pico Rivera,

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[1] The parties have consented to the filing of this *amicus* brief, and their letters of consent have been filed with the Clerk. This *amicus* brief was not authorized in whole or in part by counsel for a party, and no person or entity other than *Amici* or their members made a monetary contribution toward its preparation or submission.

Placerville, Pleasant Hill, Pleasanton, Porterville, Rancho Santa Margarita, Red Bluff, Redding, Redlands, Reedley, Redondo Beach, Rialto, Ridgecrest, Ripon, Rio Vista, Riverside, Rocklin, Rolling Hills Estates, Rosemond, Roseville, Ross, San Buenaventura, San Carlos, San Clemente, San Dimas, San Gabriel, San Joaquin, San Jose, San Marcos, San Mateo, San Pablo, Santa Clarita, Santa Rosa, Santee, Sausalito, Selma, Signal Hill, Simi Valley, Sonora, South Gate, Stockton, Sunnyvale, Tehachapi, Thousand Oaks, Tiburon, Torrance, Truckee, Turlare, Turlock, Tustin, Union City, Vacaville, Vallejo, Ventura, Vernon, Victorville, Vista, Walnut, Wasco, Waterford, Watsonville, Weed, Willits, Woodlake, Woodland, Yreka, Yuba City, the California Joint Powers Risk Management Authority, the Redwood Empire Municipal Insurance Fund, the City of Denver, Colorado, the Territory of Guam, and the Commonwealth of Puerto Rico (collectively, "*Amici Curiae*") respectfully submit this Brief as *Amici Curiae* in support of Petitioners the City of Sacramento, et al.

Each of the California Cities participating as an *Amici Curiae* is a member of the League of California Cities.[2] The California Joint Powers Risk Management Authority is a California Public Agency whose membership includes 16 California Cities and five joint powers authorities. The Redwood Empire Municipal Insurance Fund is a joint powers authority that handles the liability claims and losses for 15 Northern California Cities. The City of Denver, Colorado is a municipality. The Territory of Guam is an organized, unincorporated territory of the United States. The Commonwealth of Puerto Rico is a commonwealth associated with the United States. *Amici* have a compelling interest in the legal issues presented in the City of Sacramento's Petition

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[2] As a matter of policy, the League of California Cities does not participate as an *amicus curiae* in its own name, but instead authorizes and recommends participation by its individual municipal members, which the League has done in this case.

for a Writ of Certiorari. Cities in California and throughout the United States have spent hundreds of millions of dollars in public funds to comply with the program access requirements of Title II of the Americans with Disabilities Act ("ADA"). Under Title II, Congress directed that public programs, services and activities be made accessible to persons with disabilities, and public entities have been required to prioritize their allocation of funding and other resources in accordance with the program accessibility mandate.

Consistent with Congress' requirement of program access, public entities have prioritized their expenditures to eliminate programmatic barriers, and they are removing non-programmatic barriers through the incorporation of accessible design features when structures are constructed or altered. This prioritization between programmatic and non-programmatic barriers has allowed the cities to achieve broad program accessibility, while allowing non-programmatic barriers to be efficiently eliminated by means of the incremental process of replacement through new construction and alterations.

If the decision of the Court of Appeals for the Ninth Circuit in this case were allowed to stand, public entities would lose the ability to prioritize funding toward the elimination of programmatic barriers, and they could potentially be burdened with the enormous cost of rebuilding the entire public infrastructure – approximately $2.5 billion for sidewalks in California alone – despite Congress' clear intent that non-programmatic barriers be eliminated solely through the incorporation of accessible features in new construction and alterations.

For these reasons, *Amici* respectfully submit this Brief in support of Petitioner the City of Sacramento's Petition for a Writ of Certiorari.

SUMMARY OF ARGUMENT

When Congress enacted the Americans with Disabilities Act of 1990 ("ADA"), it sought to balance the societal interest in greater disabled access with the need to ensure the efficient use of limited public resources. The ADA and its implementing regulations reflect Congress' recognition that it would be impossible and undesirable to require the demolition and rebuilding of the nation's entire public infrastructure in order to achieve universal accessibility to persons with disabilities. Instead, the ADA and its implementing regulations incorporated a two-part approach designed to improve the accessibility of the existing infrastructure: (1) through the imposition of a program access standard applicable to existing facilities where programs are offered; and (2) by requiring the incorporation of accessibility features in new construction and alterations.

Under this approach, the public infrastructure has been and continues to be made fully accessible incrementally through the enforcement of current access standards in new construction or alterations.[3] During this transition period, public entities are not required to rebuild or modify existing non-programmatic structures, but they do need to comply with the program access standard, which requires that public programs, services and activities be made accessible to persons with disabilities.

Disregarding this balancing approach, the Ninth Circuit has effectively reinterpreted the program access standard to require universal access to the entire public infrastructure. Although the Ninth Circuit and other courts of appeals had previously interpreted the term "program" to require some

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[3] The Department of Justice, however. has not yet issued design access standards for new construction and alterations in the public rights-of-way. 64 Fed. Reg. 43,980, 43,980-81 (1999).

form of public "action" or "output,"[4] the Ninth Circuit nevertheless held in this case that existing sidewalks and other structures in the public rights-of-way are a "program" for purposes of Title II of the ADA and Section 504 of the Rehabilitation Act.

This decision is patently wrong, and is in conflict with the prior body of circuit court case law, as well as inconsistent with the statutory language and regulations at issue. Existing sidewalks and other structures in the public rights-of-way are not "actions" or "outputs" of public entities, but rather are physical things that have an existence independent of any ongoing program, service or activity. Nor is a public entity's mere ownership of existing structures in the public rights-of-way sufficient to make those structures "programs" for purposes of the ADA and Rehabilitation Act. Ownership of property is not an "action" or "output" but rather is a legal relationship expressed as "the right of one or more persons to possess and use [the property] to the exclusion of others." *G.S. Rasmussen & Assoc, Inc. v. Kalitta Flying Serv., Inc.*, 958 F.2d 896, 902 (9th Cir. 1992) (quoting CAL. CIV. CODE § 654). As the courts had previously held, a mere legal relationship between a public entity and others is not a "program," "service" or "activity." *See Zimmerman*, 170 F.3d at 1175-76 (employment relationship between a public entity and person is not a "program" or "activity" provided by a public entity). *See also Decker v. Univ. of Houston*, 970 F. Supp. 575, 578 (S.D. Tex. 1996) ("[t]he phrase 'services, programs, or activities' . . . understood as a whole, focuses on a public entity's outputs rather than its inputs"), *aff'd*, 159 F.3d 1355 (5th Cir. 1998) (table).

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[4] *See Zimmerman v. Oregon Dep't of Justice*, 170 F.3d 1169, 1174 (9th Cir. 1999) (term "program" means some form of public "action" or "output"), *cert. denied*, 121 S. Ct. 1186 (2001); *Johnson v. City of Saline*, 151 F.3d 564, 570 (6th Cir. 1998) (term "program" refers to "activities of a public entity").

The Ninth Circuit's holding that the mere existence of a structure in the public rights-of-way constitutes a "program" will overturn the entire regulatory framework for disabled access. Under the Ninth Circuit's reinterpretation of the program access requirement, all structures and facilities will need to be made accessible at enormous cost, regardless of whether programs were offered at those structures and facilities, and notwithstanding the clear language of the applicable regulation that a public entity need only identify and remediate "physical obstacles in [its] facilities *that limit the accessibility of its programs or activities* to individuals with disabilities." 28 C.F.R. § 35.150(d)(3)(i) (emphasis added).

ARGUMENT

A. The Court of Appeals Erred in Holding That Existing Sidewalks Are a City Program, Service or Activity, and Thus Are Subject to the Program Access Requirements of the ADA and Rehabilitation Act.

1. The Statutes at Issue Provide for Access to a Public Entity's Programs, Services and Activities.

Respondents' claims are based on Title II of the ADA, 42 U.S.C. § 12101, *et seq.*, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. Title II of the ADA is the "public services" title and proscribes the denial of the benefits of "services, programs or activities" of a public entity on the basis of disability:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation or denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132.

Section 504 of the Rehabilitation Act similarly prohibits discrimination against disabled persons in federally-assisted programs and activities:

> No otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

29 U.S.C. § 794.

To prove a violation under Title II, a plaintiff must show: (1) he or she is a "qualified individual with a disability"; (2) he or she was either excluded from participation in or denied the benefits of a public entity's "services, programs or activities," or was otherwise discriminated against by the public entity; and (3) such exclusion, denial of benefits or discrimination was by reason of the disability. 42 U.S.C. § 12132; *Weinreich v. Los Angeles County Metro. Transp. Auth.*, 114 F.3d 976, 978 (9th Cir. 1997). Similarly, under Section 504 of the Rehabilitation Act, a plaintiff must show: (1) he or she is a "qualified individual with a disability"; (2) he or she was denied the benefits of the program solely by reason of the disability; and (3) the program received Federal financial assistance. 29 U.S.C. § 794; *Bonner v. Lewis*, 857 F.2d 559, 562-63 (9th Cir. 1988).

A plaintiff must prove the denial of access to a public entity's program, service or activity, regardless of whether the plaintiff's claim is brought under Title II's program access provision or the general anti-discrimination provision. *Zimmerman v. Oregon Dep't of Justice*, 170 F.3d 1169, 1175-76 (9th Cir. 1999), *cert. denied*, 121 S. Ct. 1186 (2001). A plaintiff is not "qualified" to bring a Title II claim unless he or she "meets the essential eligibility requirements" of a program, service or activity provided by a public entity. *Id.* at 1175. The general anti-discrimination provision, therefore, must relate to a government program, service or activity;

otherwise a plaintiff is not "qualified" to bring a claim under that clause. *Id.*

2. The Applicable Regulations Provide Different Rules for Existing Facilities and New Construction or Alterations.

The ADA directs the United States Attorney General to promulgate regulations to implement Title II. These regulations are codified in Title 28, Chapter 35 of the Code of Federal Regulations. The regulations establish separate requirements for existing facilities and for new construction and alterations. As set forth below, the regulations impose broader accessibility requirements for new construction and alterations than for existing facilities.

Section 35.151 applies to newly-constructed or altered facilities and requires that new construction and alterations commenced after January 26, 1992 be performed in such a manner that the new or altered facility, or part of the facility, is readily accessible to and usable by individuals with disabilities. 28 C.F.R. § 35.151(a)-(b). It mandates that new construction or alterations be performed in conformance with the Uniform Federal Accessibility Standards ("UFAS") or the ADA Accessibility Guidelines ("ADAAG") to be issued by the United States Architectural and Transportation Barriers Compliance Board ("Access Board"). *Id.* § 35.151(c).

By contrast, Section 35.150, which applies to existing facilities, specifically provides that public entities do *not* have to make each existing facility accessible to and usable by individuals with disabilities. *Id.* § 35.150(a)(1). Instead, Section 35.150 reiterates the Congressional mandate of program accessibility, and states that "[a] public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." *Id.* § 35.150(a).

A critical distinction between newly-constructed or altered facilities and existing facilities is that a public entity's

obligation to maintain accessible features in operable working condition applies only to newly-constructed or altered features. *Id.* § 35.133(a). Section 35.133 provides that "[a] public accommodation shall maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities by the Act or this part." *Id.* Because existing non-programmatic facilities need not be readily accessible and usable, Title II does *not* mandate that such facilities be maintained in operable working condition.

As a means of ensuring program accessibility, public entities employing at least 50 persons must adopt a transition plan if structural changes are undertaken to achieve *program* accessibility. *Id.* § 35.150(d)(1) (emphasis added). In preparing the transition plan, the public entity must "[i]dentify physical obstacles in the public entity's facilities *that limit the accessibility of its programs or activities* to individuals with disabilities." *Id.* § 35.150(d)(3)(i) (emphasis added). The public entity must describe in detail the methods that will be used to make these facilities accessible, specify the schedule for doing so, and identify the responsible official. *Id.* § 35.150(d)(3)(ii)-(iv). As this regulatory language makes clear, the transition plan need only address programmatic barriers in existing facilities.

3. Existing Sidewalks Are Not a Public Program, Service or Activity.

Despite the plain language requiring only that programmatic barriers be addressed in the transition plan, the Ninth Circuit's decision will require public entities to identify and remove all physical obstacles in existing facilities. *Id.* § 35.150(d)(3)(i). By effectively interpreting the terms "facilities," "programs" and "activities" as equivalent, interchangeable terms, the Ninth Circuit's decision will effectively remove from the regulation the terms "programs" and "activities."

The interpretation of the terms "programs" and

"activities" as interchangeable with the preceding term "facilities" will drastically change the meaning and scope of Section 35.150(d), and will require public entities to make existing non-programmatic structures accessible, despite the clear language limiting the transition plan requirements to "physical obstacles in the public entity's facilities *that limit the accessibility of its programs or activities* to individuals with disabilities." *Id.* § 35.150(d)(3)(i) (emphasis added).

The Ninth Circuit's interpretation of these terms not only violates the maxim against the interpretation of statutes or regulations that renders terms inoperative or superfluous,[5] but conflicts with its own earlier decisions, and those of other courts of appeals, interpreting the term "program" to mean some form of public "action" or "output." *Zimmerman v. Oregon Dep't of Justice*, 170 F.3d 1169, 1174 (9th Cir. 1999), *cert. denied*, 121 S. Ct. 1186 (2001). *See also Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 731-32 (9th Cir. 1999) (definition of "program" encompasses public "operations" and things that a public entity "*does*," including zoning "activities") (emphasis added); *Johnson v. City of Saline*, 151 F.3d 564, 570 (6th Cir. 1998) (term "program" refers to "activities of a public entity").

An existing sidewalk is not an "action," "output," "operation" or "activity" of a public entity. Rather, a sidewalk is a structure that exists independent of any ongoing program, service or activity. Likewise, a public entity's ownership of existing sidewalk is not an "action" or "output" but, rather, is a legal relationship defined as "the right of one or more persons to possess and use [the property] to the

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[5] *See, e.g., Andreiu v. Ashcroft*, 253 F.3d 477, 480 (9th Cir. 2001) ("statutes must be interpreted, if possible, to give each word some operative effect") (internal punctuation omitted); *Glover v. West*, 185 F.3d 1328, 1332 (Fed. Cir. 1999) ("we attempt to give full effect to all words contained within th[e] statute or regulation, thereby rendering superfluous as little of the statutory or regulatory language as possible").

exclusion of others." *G.S. Rasmussen & Assoc, Inc. v. Kalitta Flying Serv., Inc.*, 958 F.2d 896, 902 (9th Cir. 1992) (quoting CAL. CIV. CODE § 654). *See also Zimmerman*, 170 F.3d at 1175-76 (employment relationship between public entity and employee is not a "program" or "activity").

4. The Regulations Identify Missing Curb Ramps as the Only Feature to Be Identified in the Transition Plan.

Significantly, Section 35.150(d) contains a separate provision setting forth the transition plan requirements that apply when "a public entity has responsibility or authority over streets, roads, or walkways." 28 C.F.R. § 35.150(d)(2). Subsection (d)(2) specifically provides that "[i]f a public entity has responsibility or authority over streets, roads, or walkways, its transition plan shall include a schedule for providing curb ramps or other sloped areas where pedestrian walks cross curbs." *Id.* Subsection (d)(2) imposes no further transition plan requirements on public entities having responsibility or authority over public rights-of-way, and it excludes any reference to the broader transition plan requirements applicable to facilities other than streets, roads and walkways.

Under the statutory canon of *expressio unius*, the incorporation of the specific curb-ramp requirements in Subsection (d)(2) to the exclusion of the more general requirements set forth in Subsection (d)(3) must be presumed intentional. *Botosan v. Paul McNally Realty*, 216 F.3d 827, 832 (9th Cir. 2000). It is presumed that the Department of Justice ("DOJ") intended to include in Subsection (d)(2) all of the transition plan requirements that apply to public rights-of-way, since the DOJ included in Subsection (d)(2) the specific curb-ramp requirements but excluded any reference to the

more general transition plan requirements that apply outside the public rights-of-way.[6] *Id.*

Section 35.150(d)(2), then, should be interpreted as setting forth the definitive transition plan requirements for public streets, roads and walkways, and Subsection (d)(3) should be construed as setting forth more general requirements applicable to locations outside the public rights-of-way.[7]

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[6] *See also Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228, 77 S. Ct. 787, 791-92 (1957) ("However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment. Specific terms prevail over the general in the same or another statute which otherwise might be controlling") (internal punctuation omitted); *Weiss v. CIGNA Healthcare, Inc.*, 972 F. Supp. 748, 754 (S.D.N.Y. 1997) ("the general language of a statute will not be held to apply to a matter specifically dealt with in another part of the same enactment") (internal punctuation omitted).

[7] The DOJ's new position on this issue, articulated for the first time in its *amicus* brief in the proceedings below, is directly contrary to its long-held position that the program access requirement applies to sidewalks only when they provide immediate access to a facility where a public program, service or activity is offered. *See* 5/14/98 Letter from Bill Lann Lee, Acting Assistant Attorney General, Civil Rights Division, to U.S. Representative William D. Delahunt ("*if the sidewalk is part of an accessible route that is required to provide access to a covered program or activity*, the public entity that provides the program would be required to ensure the sidewalk remains accessible") (emphasis added), *available at* http://www.usdoj.gov/crt/foia/tal760.txt; 12/21/95 Letter to U.S. Representative Charles H. Taylor ("if a public entity has responsibility for, or authority over, sidewalks or other public walkways, *and if such sidewalks or walkways are necessary to ensure accessibility to the entity's programs, services, or activities*, then the public entity has an obligation to maintain the sidewalks or walkways in usable working condition") (emphasis added), *available at* http://www.usdoj.gov/crt/foia/tal661.txt.

Further, the DOJ's reliance on the transition plan requirements relating to curb ramps as support for its new position is misplaced. The requirement in 28 C.F.R. § 35.150(d)(2) that a public entity include in its transition plan a schedule for providing curb ramps does not mean that the

B. Applying the Program Access Standard to Existing Sidewalks Where No Programs Are Offered Undermines the Goals Underlying the Standard.

The imposition of the program access standard on sidewalks and other structures in the public rights-of-way where no public programs, services or activities are offered will jeopardize public entities' ability to achieve the levels of accessibility mandated by Title II of the ADA and Section 504 of the Rehabilitation Act. Public entities have only limited funds and other resources available to spend on public facilities and infrastructure, and need to preserve their ability to concentrate the expenditure of these resources where it will actually improve the accessibility of their programs, services and activities to persons with disabilities. The Ninth Circuit's broadening of the program access standard to encompass all physical structures, regardless of whether public programs are offered at those structures, will divert public expenditures to facilities where no programs are offered, and will thereby reduce the overall benefit to disabled persons while greatly increasing the cost of accessibility compliance.

In California, the enormous scale of the public rights-of-way ensures that the Ninth Circuit's decision will have profound impacts on public entities' ability to comply with the program access standard. California's cities obtain public funds from finite Federal, State and local sources, and their ability to generate additional tax revenues is subject to

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entity's public rights of way constitute a public program. On its face, this procedural mandate is directed solely at documenting progress toward the universal installation of curb ramps, which is being achieved voluntarily by cities throughout the United States, and does not contain any substantive requirement for the installation of curb ramps on existing sidewalks. Any such requirement would be invalid, since Congress clearly required that existing structures be rebuilt or altered only where necessary to achieve program access, and Congress left no room for any regulation mandating the rebuilding or altering of existing structures where no public programs, services or activities are offered.

numerous legal, political and economic constraints. In order to meet the cities' legal responsibility to provide for the public safety, utilities, health and other needs, most of their tax revenues must be spent on governmental functions other than transportation.[8] Of the estimated 8% of total revenues available for city streets and roads,[9] all but a small fraction must be spent on new construction, reconstruction, signals and safety devices.[10] In the most recent fiscal year reported, only approximately $55 million in public funds were available to California's cities to spend on pedestrian ways and bicycle paths.[11]

California has an estimated 166,971 miles of public roadway, of which 69,422 miles (approximately three times the Earth's circumference) are city streets.[12] At an estimated per-mile sidewalk construction cost of $36,000[13] (for both sides of the street, at the four-foot width that Respondents contend is required), the costs to California cities of

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[8] *See* CAL. STATE CONTROLLER, CITIES ANNUAL REPORT, at xx, Figure 16 (2001), *available at* http://www.sco.ca.gov/ard/local/locrep/cities/9899/cities.shtml. *Amici* request that the Court take judicial notice of the statistical information set forth in this Brief, which is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. FED. R. EVID. 201(b).

[9] *Id.*

[10] CAL. STATE CONTROLLER, STREETS AND ROADS ANNUAL REPORT, at xii, Figure 14 (2002), *available at* http://www.sco.ca.gov/ard/local/locrep/streets/90-00/.

[11] *Id.*

[12] *See* CAL. DEP'T OF FINANCE, CALIFORNIA STATISTICAL ABSTRACT, Table J-1 (2000), *available at* http://www.dof.ca.gov/html/fs_data/stat-abs/sec_J.htm. *See also* NEW YORK PUBLIC LIBRARY SCIENCE DESK REFERENCE at 372 (MacMillan) (the Earth's circumference at the equator is 24,901 miles).

[13] *See* FLA. DEP'T OF TRANSPORTATION, COST OF URBAN TRANSPORTATION SYSTEMS, Unit Costs for Bicycle and Pedestrian Facilities (1996), *available at* http://www.commuterservices.com/costs.htm.

rebuilding their existing sidewalks to conform with the design standards sought by Respondents would total approximately $2.5 billion, exclusive of the costs of demolition and acquisition of enlarged rights-of-way. Given the fundamental sidewalk design changes that Respondents contend is required to make the public rights-of-way accessible, the costs of altering existing sidewalks to implement such changes would likely exceed the costs of demolition and rebuilding, such that a total cost of $2.5 billion would be likely regardless of whether the changes were achieved through rebuilding, alteration, or both.[14]

The extraordinary magnitude of such an undertaking would overwhelm the cities' resources and be impossible to achieve. Yet despite the enormous costs that would be required to rebuild the existing sidewalk infrastructure, there would be no commensurate benefit in the accessibility of public programs, services and activities, since Respondents seek to require the cities to rebuild sidewalks and other structures in rights-of-way where no programs, services or activities are offered.[15]

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[14] The total cost of rebuilding or altering sidewalks nationwide would likely be ten times that amount (or approximately $25 billion). The urban street system in the United States contains in excess of 800,000 miles of street – more than ten times the mileage of California's city streets. *See* U.S. DEP'T OF TRANSPORTATION, U.S. PUBLIC ROAD AND STREET MILEAGE BY FUNCTIONAL SYSTEM (2000), *available at* http://www.bts.gov/btsprod/nts/Ch1_web/1-5.htm.

[15] Respondents argued below that the adoption of their interpretation of "program" to mean any structure in the public rights-of-way would have only "limited" impact on public entities, because public entities could rely on the "undue burden" provisions of the ADA and its regulations. This argument ignores the breadth of the injunctive relief sought by Respondents in the proceedings in the District Court.

Further, to the extent that Respondents will contend that "undue burden" is an affirmative defense for which public entities have the burden of proof, Respondents' position would improperly shift to public entities the burden of proving that the removal of non-programmatic barriers

CONCLUSION

Existing sidewalks in the public rights-of-way are not programs, services or activities of a public entity, nor is a public entity's ownership of existing sidewalks a program, service or activity. The applicable statutes and regulations do not require that existing non-programmatic structures be made accessible to persons with disabilities, consistent with Congress' recognition that accessibility should be achieved through a cost-effective, two-part process of: (1) requiring accessibility in facilities where public programs, services and activities are offered; and (2) mandating the incorporation of accessibility features in new construction and alterations.

Existing structures in the public rights-of-way where no programs, services or activities are offered do not fall into either category, and thus are not subject to the transition plan requirements of the statutes and regulations at issue in this appeal. Neither the statutes nor the regulations provide a basis for requiring public entities to expend the billions of

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would be unduly burdensome, despite the fact that the ADA and its enabling regulations do not require the elimination of non-programmatic barriers (other than through the process of incorporating accessibility features in new construction and alterations).

Additionally, Respondents' "undue burden" argument disregards the enormous cost of the sidewalk accessibility surveys that Respondents contend must be performed before any "undue burden" analysis can be undertaken. Respondents seek to require public entities to survey the configurations of each sidewalk – which are constantly changing due to tree growth, subsidence and other physical forces beyond the cities' control – to identify physical obstacles to accessibility. This undertaking, alone, would impose massive costs on public entities with no benefit to program accessibility.

Finally, *Amici* anticipate that a court might conceivably determine the undue burden defense to be inapplicable to the transition plan survey provisions of 28 C.F.R. § 35.150(d). To the extent any such determination were correct, public entities could be required to undertake the phenomenal expense of surveying all sidewalks nationwide, without the availability of the undue burden defense.

dollars required to survey and rebuild or alter sidewalks in the public rights of way where no public programs, services or activities are offered.

Amici Curiae, therefore, respectfully request that this Court grant the Petition for a Writ of Certiorari of Petitioner the City of Sacramento, et al.

Respectfully submitted,

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CITY OF SACRAMENTO and MIKE KASHIWAGI,
Director of the Department of
Public Works of the City of Sacramento,
in his official capacity,

Petitioners,

v.

JOAN BARDEN, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, THE CITIES OF ALBANY, GA, BIRMINGHAM, AL, BOSTON, MA, DALLAS, TX, DES MOINES, IA, DETROIT, MI, DOVER, DE, LITTLE ROCK, AR, MEMPHIS, TN, MILWAUKEE, WI, NASHVILLE, TN, NEW YORK, NY, PHOENIX, AZ, PITTSBURGH, PA, SAINT PETERSBURG, FL, AND THE U.S. VIRGIN ISLANDS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF THE *AMICI CURIAE*

Pursuant to Rule 37 of the Rules of the Supreme Court of the United States, the National League of Cities, the U.S. Conference of Mayors, the International Municipal Lawyers Association, the cities of Albany, GA, Birmingham, AL, Boston, MA, Dallas, TX, Des Moines, IA, Detroit, MI, Dover, DE, Little Rock, AR, Memphis, TN, Milwaukee, WI, Nashville, TN, New York, NY, Phoenix, AZ, Pittsburgh, PA, Saint Petersburg, FL, and the U.S. Virgin Islands (collectively, "*Amici Curiae*" or "*Amici*") respectfully submit this Brief as *amici curiae* in support of the Petition for Writ of Certiorari filed by the City of Sacramento.[1]

The *Amici Curiae*, all of whom are public entities or associations of representatives of public entities, share an interest in the proper interpretation and application of the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973 because these statutes require public entities to meet certain accessibility standards related to disabled individuals. The *Amici* have a vital interest in ensuring that the accessibility requirements mandated by the courts conform to the statute, and are interpreted as Congress intended.

Founded in 1924, the National League of Cities ("League") is the oldest and largest national organization

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[1] Letters of consent to the filing of this brief have been filed with the Clerk of the Court. Counsel for the parties to this action did not author this brief, in whole or in part. No person or entity other than *Amici Curiae*, their members and their counsel made monetary contributions to the preparation or submission of this brief.

representing municipal governments throughout the United States. The League serves as a national resource and advocate on behalf of over 1,700 member cities and 49 municipal leagues whose membership totals more than 18,000 cities and towns across the United States. The League's mission is to strengthen and promote cities as centers of opportunity, leadership and governance.

The U.S. Conference of Mayors is the official nonpartisan organization of cities with populations of 30,000 or more. There are 1,183 such cities in the United States today. Each city is represented in the Conference of Mayors by its chief elected official, the mayor. The Conference of Mayors seeks to promote the development of effective national urban/suburban policy, strengthen federal-city relationships, ensure that federal policy meets urban needs, provide mayors with leadership and management tools, and create a forum in which mayors can share ideas and information. During its annual meeting, the Conference of Mayors through its membership of mayors adopts policy positions reflecting their collective views on serious urban problems and possible solutions.

The International Municipal Lawyers Association ("IMLA") is a nonprofit, nonpartisan professional organization consisting of more than 1,400 members. IMLA's membership is comprised of local government entities, including cities and counties, state municipal leagues, and individual attorneys who represent municipalities, counties, and other local government entities. IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts, providing services and educational programs to local governments and their attorneys since 1935. Since its establishment, IMLA has advocated for the rights and

privileges of local governments. Specifically, the Legal Advocacy Program of IMLA serves the membership by advocating the nationwide interests, positions, and views of local governments on legal issues.

Sixteen *Amici* are large public entities subject to the accessibility requirements of Title II of the Americans with Disabilities Act. Of these, fifteen are cities in the United States and one (the U.S. Virgin Islands) is a territory of the United States. All of the *Amici,* through their counsel of record, have consented to the filing of this *Amici* brief.

Amici's specific interest in this case lies in the impact the Ninth Circuit's decision will have on state and local governments throughout the United States. Over 39,000 local governments (including counties, towns and municipalities) exist in the United States. State and local governments have already spent hundreds of millions of dollars in public funds to satisfy the accessibility mandates set forth in the ADA. The Ninth Circuit's decision significantly expands the scope of the ADA, and requires expenditures for accessibility that far exceed those mandated by the ADA. If permitted to stand, the Ninth Circuit's decision will severely diminish the already strained coffers of state and local governments, forcing the public entities to allocate an untenably large proportion of scarce, limited public funds to ADA compliance. Accordingly, *Amici* file this brief on behalf of its members' nationwide.

In addition, *Amici* support Petitioners' Writ of Certiorari because they have a keen interest in ensuring that the Ninth Circuit, and all courts, follow the law. By improperly extending the accessibility requirements beyond the plain language and intent of the underlying statutes, the Ninth

Circuit acted beyond the scope of its authority, with staggering fiscal ramifications for state and local governments in the Ninth Circuit and throughout the United States.

For these reasons, *Amici* respectfully submit this Brief in support of the Petition for Writ of Certiorari filed by the City of Sacramento.

SUMMARY OF ARGUMENT

The Americans with Disabilities Act of 1990 ("ADA") introduced new and sweeping requirements for public entities to provide greater access to persons with disabilities. Balancing the public interest in achieving accessibility for disabled persons against the burden on public entities of shouldering tremendous financial costs, Congress enacted a statutory framework to achieve universal accessibility through immediate access to programs but more gradual, incremental implementation of access to facilities. The ADA requires the *programs* of public entities ("programs, services and activities") to be readily accessible to disabled persons immediately. However, mindful of the significant financial impact of physical changes to *facilities* (the buildings, roads, sidewalks and other physical infrastructure of public entities), the ADA does not require immediate access to facilities but instead imposes an accessibility requirement only when the public entity alters the facility, constructs new facilities, or when facility modification is the only way to make programs accessible.

By enforcing program accessibility immediately and requiring facility accessibility primarily when the public

entity chooses to alter or to construct facilities, Congress built a legal structure to implement the goals of the ADA over a reasonable time period while preserving the ability of the public entity to prioritize its expenditure of limited financial resources. The public entity need only comply *immediately* with the program accessibility standard, and can achieve program accessibility even when its facilities are not accessible. This important distinction between the requirements for programs and the requirements for facilities lies at the core of the effective implementation of the plan carefully crafted by Congress.

The Ninth Circuit decision disregards this central distinction and attempts to apply the program accessibility standard to facilities. The Ninth Circuit in this case held that a physical sidewalk (and, by implication, every public building, structure and right of way) is a "program" for purposes of enforcing Title II of the ADA and Section 504 of the Rehabilitation Act. The decision requires the City of Sacramento, and every other public entity, to make all facilities accessible immediately. This is contrary to the statutory language and regulations at issue and imposes on public entities an extraordinary financial burden not contemplated by Congress or articulated in the statute.

The legal alchemy of transmuting a facility into a program simply because the facility is owned or maintained by the public entity disregards the statutory framework and ignores the common sense definition of the terms chosen by Congress. Under the Ninth Circuit's new definition of "program," every building, sidewalk, bridge, road and other physical structure owned or operated by a public entity would be subject to immediate accessibility requirements, achievable only at a staggering financial cost.

The ADA implementation scheme crafted by Congress is demolished by the Ninth Circuit decision. The public entity is stripped of its statutory right to choose an appropriate method for making programs accessible, and must instead devote huge sums to immediate alteration or new construction of facilities. The Ninth Circuit's decision wrongly interprets the law and as a result, wrongly imposes enormous financial burdens not contemplated by the statutes.

ARGUMENT

I. IN RECOGNITION OF THE ENORMOUS BURDEN INHERENT IN MAKING ACCESSIBLE THE ENTIRE PUBLIC INFRASTRUCTURE, CONGRESS DISTINGUISHED FACILITY ACCESSIBILITY FROM PROGRAM ACCESSIBILITY

The statutory and regulatory provisions involved are Title II of the ADA, 42 U.S.C. §§ 12131, *et seq.*, and its implementing regulations, 28 CFR §§ 35.101, *et seq.*, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794.

A. Title II Requires Program Accessibility To Be Implemented Promptly

Title II of the ADA requires a public entity to provide disabled individuals with immediate access to its "*services, programs or activities.*"[2] It provides:

[2] The Department of Justice's Technical Assistance Manual provides as follows: "Time periods for achieving program accessibility.
(Continued on following page)

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or denied the benefits of the ***services, programs or activities*** of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132 (emphasis added).

The language in Section 504 of the Rehabilitation Act is almost identical, requiring a public entity to provide disabled persons with access to its federally-assisted *programs and activities*.

> No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any ***program or activity*** receiving Federal financial assistance.

29 U.S.C. § 794(a) (emphasis added). "[T]he term 'program or activity' means all the *operations* of" a public entity. 29 U.S.C. § 794(b) (emphasis added).

The plain meaning of these express statutory terms directs the public entity immediately to provide disabled persons with access to the *programs* of the public entity. Prior to this case, the Ninth Circuit and other courts of appeals interpreted the term "program" to mean some

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Public entities must achieve program accessibility by January 26, 1992." DEPARTMENT OF JUSTICE, TITLE II TECHNICAL ASSISTANCE MANUAL § II-5.6000 (1993) (available at www.usdoj.gov/crt/ada/taman2.html). This manual is prepared as "part of a broader program of technical assistance conducted by the Department of Justice to promote voluntary compliance with the requirements not only of title II, but also of title III of the ADA." *Id.* at Introduction.

form of public "action" or "output." *See Zimmerman v. Oregon Dep't of Justice*, 170 F.3d 1169, 1174 (9th Cir. 1999), *cert. denied*, 531 U.S. 1189 (2001). *See also Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 731-32 (9th Cir. 1999); *Johnson v. City of Saline*, 151 F.3d 564, 570 (6th Cir. 1998).

Congress chose its words carefully in constructing a statutory framework to achieve prompt accessibility for disabled persons to the *programs and services* of a public entity. The implementing regulations of Title II of the ADA build on this framework. "A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150(a). The regulations require immediate compliance with program accessibility but allow the public entity to choose the method to bring its programs and activities into compliance. The regulations provide that:

> [a] public entity may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock or other conveyances, or any other methods that result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities.

28 C.F.R. § 35.150(b)(1).

B. Title II Requires Facility Accessibility To Be Implemented Incrementally, As The Public Entity Chooses To Modify Existing Facilities

In contrast to the requirement for prompt implementation of program accessibility, Congress crafted a different standard for facility accessibility, requiring full compliance only after the public entity chooses to alter existing facilities or to construct new facilities. 42 U.S.C. §§ 12146 and 12147(a). This incremental implementation for facility accessibility applies to the entire physical infrastructure of the public entity. The regulations state that:

> *Facility* means all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located.

28 C.F.R. § 35.104 (emphasis in original).

Recognizing the extraordinary financial cost to modify existing facilities to make them accessible immediately, Congress adopted a plan to achieve universal accessibility to facilities over a reasonable period of time, deferring full accessibility until the public entity chooses to make alterations to existing facilities or to construct new facilities. 42 U.S.C. §§ 12146, 12147. Eventually, all facilities would be altered or replaced with altered or newly constructed facilities, and the public entity would achieve universal accessibility to all facilities. This framework is repeated in the regulations. "A public entity, in making alterations to existing buildings, shall meet the accessibility requirements of § 35.151." 28 C.F.R. § 35.150(b)(1).

"Each facility or part of a facility constructed by, on behalf of, or for the use of a public entity shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.151(a). Congress, in drafting Title II of the ADA, and the Department of Justice, in drafting the implementing regulations,[3] thus designed a scheme for public entities to prioritize public expenditures eventually to achieve universal facility accessibility over the course of time, with alterations to existing facilities and construction of new facilities. Rather than mandate immediate accessibility to existing facilities, the regulations expressly declare that a "public entity is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section."[4] 28 C.F.R. § 35.150(b)(1).

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[3] The Attorney General, acting through the Department of Justice, is charged with responsibility for promulgating regulations to implement Title II of the ADA. 42 U.S.C. § 12134(a).

[4] "Unlike private entities under title III, public entities are not required to remove barriers from each facility, even if removal is readily achievable. A public entity must make its "programs" accessible. Physical changes to a building are required only when there is no other feasible way to make the program accessible. [¶] In contrast, barriers must be removed from places of public accommodation under title III where such removal is 'readily achievable,' without regard to whether the public accommodation's services can be made accessible through other methods." DEPARTMENT OF JUSTICE, TITLE II TECHNICAL ASSISTANCE MANUAL § II-5.2000 (1993) (available at www.usdoj.gov/crt/ada/taman2.html).

C. Existing Sidewalks Are Facilities

A sidewalk is a facility. 28 C.F.R. § 35.104 ("Facility means all or any portion of . . . roads, walks, passageways. . . . "). A public entity that chooses to make changes to its facilities to achieve program accessibility must develop a transition plan setting forth the steps necessary to complete the changes in facilities. 28 C.F.R. § 35.150(d)(1). The regulations specifically require the transition plan to address one aspect – sidewalks:

> If a public entity has responsibility or authority over streets, roads, or walkways, its transition plan shall include a schedule for providing curb ramps or other sloped areas where pedestrian walks cross curbs, giving priority to walkways serving entities covered by the Act, including State and local government offices and facilities, transportation, places of public accommodation, and employers, followed by walkways serving other areas.

28 C.F.R. § 35.150(d)(2). Thus, the regulations are not silent regarding sidewalks, but expressly describe the one and only manner in which sidewalks should be treated differently from other facilities. Otherwise, a public entity's obligation to make sidewalks accessible (other than where necessary for program accessibility (28 C.F.R. § 31.150(b))) arises only when the public entity chooses to alter the sidewalk (28 C.F.R. § 35.151(b)) or when the public entity chooses to construct a new sidewalk. 28 C.F.R. § 35.151(a).

II. THE NINTH CIRCUIT'S EXPANSIVE AND UNWARRANTED INTERPRETATION OF "PROGRAMS, SERVICES OR ACTIVITIES" IGNORES THE REMEDIAL STRUCTURE ESTABLISHED BY CONGRESS AND IMPOSES AN INORDINATE BURDEN ON LOCAL GOVERNMENT

The Ninth Circuit obliterates the Congressionally crafted distinction between "facilities" and "programs" through a simple syllogism: everything a local government does is a "program, service, or activity" under Title II; local governments "maintain" existing sidewalks, therefore existing sidewalks are a "program" which must be made immediately accessible. Not only does this disregard entirely the structure described above that Congress has crafted to achieve in a feasible manner access to public services, but if uncorrected by this Court, it will impose a crushing burden on local governments, contrary to explicit assumptions underlying the ADA.

A. By Designating The "Maintenance" Of Existing Facilities A "Program" Of Local Government, The Ninth Circuit Obliterates The Distinction Between "Facilities" And "Programs"

The district court below concluded that sidewalks are not a service, program, or activity of the City. *Barden v. City of Sacramento,* 292 F.3d 1073, 1075 (9th Cir. 2002). In rejecting this common-sense conclusion, the Ninth Circuit chose not to examine "whether each function of a city can be characterized as a service, program, or activity for purposes of Title II. . . . " *Id.* at 1076. Rather, the court noted, "we have construed 'the ADA's broad language [as] bring[ing] within its scope 'anything a public entity

does.'" *Id.* Thus, the court declares, "[t]he focus of the inquiry . . . is not so much on whether a particular public function can technically be characterized as a service, program, or activity, but whether it is 'a normal function of a governmental entity.'" *Id.* From this, it was but a short, false step to the court's conclusion: "maintaining public sidewalks is a normal function of a city and without a doubt something that the [City] 'does.' . . . Maintaining their accessibility for individuals with disabilities therefore falls within the scope of Title II." *Id.* (internal quotation marks and citation to *Hason v. Medical Bd.*, 279 F.3d 1167, *cert. granted on other grounds,* 123 S. Ct. 561 (2002 omitted).

The syllogism is flawed in at least two critical respects. First, it ignores entirely the different remedial schemes described above that Congress has established for facilities versus programs. Congress chose to treat the two quite differently, requiring alteration of facilities only where necessary to make programs accessible, or in connection with new construction or alterations. 28 C.F.R. §§ 35.150(a), 35.151(a)-(b). Second, it conflates the two. By artfully inserting the modifier "maintaining" in front of "sidewalks," the Ninth Circuit transforms an object into a function – sidewalks into maintaining sidewalks.[5] The consequences are far more than a matter of semantics. Every facility must be maintained, and so every facility

[5] The regulations recognize that maintaining a facility does not alone trigger accessibility requirements. They impose an obligation on the public entity to maintain accessible features in operable working condition only for newly-constructed or altered features and not for existing facilities. 28 C.F.R. § 35.133(a).

becomes "something local government does." According to the Ninth Circuit, therefore, every facility must be made immediately accessible under the "program, services, or activities" provisions of Title II. As a result, the statutory and regulatory provisions relating to alteration of existing structures, or the construction of new facilities, become superfluous. *See, e.g., TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (it is "a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant" (internal quotation marks and citation omitted)).

Not only does this disregard entirely the differing remedial schemes Congress established for "facilities" versus "programs," it has dire fiscal consequences for local governments forced to upgrade existing facilities across the board, without regard to whether this is necessary to make programs accessible.

B. If The Error Of The Ninth Circuit Is Not Corrected, The Burden On Local Government Will Be Extraordinary, Contrary To The Premise Upon Which Congress Enacted Title II

In the enactment of the ADA, Congress was very much aware of the enormous difference between the cost of removing barriers from existing facilities and the cost of incorporating barrier-free design into new or altered facilities. As noted in the Report submitted by the House Committee on Education and Labor in connection with HR 2273, the bill that became the ADA:

> Witnesses identified the major areas of discrimination that need to be addressed. The first is lack of physical access to facilities. *Witnesses recognized that it is probably not feasible to require that existing facilities be completely retrofitted to be made accessible. . . .*
>
> Several witnesses also recognized that newly constructed buildups should be fully accessible because the additional costs for making new facilities accessible are often nonexistent or negligible.

H.R. REP. NO. 101-485, pt. 2, at 308 (1989) (emphasis added). The same view is reflected in the report of the Congressional Budget Office to the House Committee on Education and Labor:

> H.R. 2273 would mandate that newly constructed state and local public buildings be made accessible to the handicapped. All states currently mandate accessibility in newly constructed state-owned public buildings and therefore would incur little or no costs if this bill were to be enacted. It is possible, however, that some local governments may not have such requirements. These municipalities would incur additional costs for making newly-constructed, locally-owned public buildings accessible if this bill were to become law. According to a study conducted by the Department of Housing and Urban Development in 1978, the cost of making a building accessible to the handicapped is less than one percent of total construction costs. *This estimate assumes that the accessibility features are included in the original building design. Otherwise, the costs could be much higher.*

Id. at 418-19 (emphasis added).

Thus, Congress intended no crushing burden on local governments, because it assumed, based on the evidence before it, that the costs would not be unreasonable, since only newly constructed (or altered) facilities would be subject to the sweeping accessibility mandate embodied in the statute, and for them the incremental costs would be small. For existing facilities, there was no reason to assume that the cost would be great, since modification would be required only when that was the only way to make a program within the facility accessible to the disabled. *See* 28 C.F.R. § 35.150(b).

The Ninth Circuit's decision conflating facilities and program conflicts fundamentally with these Congressional assumptions. For sidewalks alone the implications are enormous. The City of Sacramento maintains thousands of miles of streets. *See* Petition for Writ of Certiorari at 19. For towns and cities within just the Ninth Circuit, the total approaches nearly 500,000 miles. *See* U.S. DEPARTMENT OF TRANSPORTATION, PUBLIC ROAD AND STREET MILEAGE – 1994 (available at www.fhwa.dot.gov/ohim/1994/section5/hm-14.pdf). To require *immediate* widening and resurfacing of all existing walkways that do not meet new construction standards, and to relocate or remove utility poles, fire plugs, and all other obstructions could easily drain the already stressed treasuries of local governments. Congress intended no such thing. To the extent necessary to make the services of local government accessible to the disabled, a cost must be borne by the public entity immediately. But that immediate cost was never meant to include upgrading all existing facilities to

new construction standards without regard to whether such alteration is the only way to make services available.[6] The cost of making all facilities fully accessible will eventually be borne by public entities over the course of time in conjunction with alterations and new construction. However, it is clear that Congress never intended to impose the crushing cost of immediately making all existing facilities fully accessible, which is the inevitable result of the flawed decision issued by the Ninth Circuit.

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[6] It is not enough to say – as the Ninth Circuit implies here – that if its radical remedial scheme imposes an undue burden, local governments may be excused. *See Barden v. City of Sacramento*, 292 F.3d at 1078 n.6. That is not what Congress intended. If modification of an existing facility is not necessary to make a service available, there is no duty under Title II to change it, without regard to the cost of doing so. 28 C.F.R. § 35.150(b)(1) ("a public entity is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section"); *compare* 28 C.F.R. § 36.304 (Title III requires private entities to remove "architectural barriers in existing facilities" only "where such removal is readily achievable"). Cities and counties should not be put to the burden of defending litigation and otherwise incurring costs to gain exemption from a duty Congress has not imposed.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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CITY OF SACRAMENTO AND MIKE KASHIWAGI, DIRECTOR OF THE DEPARTMENT OF PUBLIC WORKS OF THE CITY OF SACRAMENTO, IN HIS OFFICIAL CAPACITY,

Petitioners,

v.

JOAN BARDEN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONERS

Until the Department of Justice filed its *amicus* brief in the Ninth Circuit in this case, the Department had repeatedly taken the position that public sidewalks are *not* themselves a "service," "program," or "activity" covered by Title II of the ADA. See Pet. 28-29; see also California Cities Br. 12 n.7. Respondents do not deny this, nor do they make any attempt to justify the Ninth Circuit's decision to accord deference to the Department's more recent, but contradictory, litigating position below. And respondents make no effort to deny our showing (Pet. 27) that the regulation on which the Justice Department relied below does not, in fact, "require[] the provision of curb ramps," as the Ninth Circuit incorrectly believed. Pet. App. 7a.

The surpassing importance of the question presented is underscored by the array of *amici* who have urged this Court to grant review, including the National League of Cities (on behalf of more than 1700 member cities and municipal leagues whose membership totals more than 18,000 cities and towns); the U.S. Conference of Mayors (on behalf of almost 1200 cities); the National Association of Counties (on behalf of more than 2000 county governments); such widely dispersed cities as Birmingham, Boston, Dallas, Denver, Detroit, Little Rock, Nashville, New York, Phoenix, and Pittsburgh; and several other important governments and organizations. The governmental bodies, which have relied for years on the Justice Department's contrary guidance, deserve an answer *from this Court* to the question presented in this case before the massive obligations that will flow from the Ninth Circuit's decision are visited upon them. And they deserve an answer that – unlike the Ninth Circuit's reasoning, which dismissed analysis of statutory text as "needless hair-splitting," Pet. App. 6a – takes account of the text and structure of the statutes, the meaning and structure of the Justice Department's regulations, and the Department's history of contradictory guidance. As we explain below, respondents' various arguments against review are all unavailing.

I. THE NINTH CIRCUIT'S DECISION IS INCONSISTENT WITH *YESKEY* AND WITH THE RESULTS REACHED BY OTHER COURTS

As we have explained (Pet. 10-18), the decision below is at odds with *Pennsylvania Dep't of Corrections* v. *Yeskey*, 524 U.S. 206 (1998); adopts an interpretation that would produce different outcomes from the results reached by other circuits in a variety of cases; and is symptomatic of broad confusion in the lower courts. Respondents' efforts at rebuttal are unconvincing.

1. The decision below is inconsistent with *Yeskey*, which turned on a careful analysis of the operative words of Title II of the ADA – "programs," "services," and "activities." See 524 U.S. at 210; Pet. 10-13. "Rather than determining whether each function of a city can be characterized as a service, program, or activity for purposes of Title II," the Ninth Circuit explained, it would rely on prior decisions holding that the ADA covers "'anything a public entity does.'" Pet. App. 5a.

Respondents say that the panel did not really "disregard[] the language of the statute" because the prior Ninth Circuit decisions on which the panel relied had for their "very foundation" the "text of the statute." Br. in Opp. 18. That is simply not so. The prior Ninth Circuit case that the panel relied on in concluding that the statutes cover "anything a public entity does" is *Lee* v. *City of Los Angeles*, 250 F.3d 668, 691 (9th Cir. 2001) (Pregerson, J.), which is equally bereft of any analysis of the operative language of the statute. The court merely adopted wholesale the conclusion of the Third Circuit in *Yeskey* (which this Court affirmed but on a different rationale, see Pet. 12-13).

Next, respondents invoke (at 13-14) the "sweeping purpose" of the ADA – a consideration, however, that this Court pointedly did *not* cite or rely on in *Yeskey*, and that in any event provides no justification for departing from the plain meaning of the language chosen by Congress. (To the extent the Eighth Circuit has – as respondents claim, Br. in Opp. 12 – misinterpreted *Yeskey* to state a "liberal construction" rule, that would

be even more reason why this Court's intervention is needed.) Respondents also attach importance to the Court's refusal, in *Yeskey*, to recognize a categorical exception for all "programs" that are run by state prisons, but that refusal hardly shows that there need be no "program" at all for the ADA to apply.

Finally, respondents suggest that this case is consistent with *Yeskey* because "one uses and benefits from the public sidewalk system, just as one uses and benefits from a library." Br. in Opp. 12. The same, of course, can be said of most of the infrastructure owned by state and municipal governments, yet it cannot possibly be true that all such public infrastructure is a service, program, or activity. See also 28 C.F.R. § 35.150(a)(1) (a public entity is not "[n]ecessarily require[d] * * * to make each of its existing facilities accessible to and usable by individuals with disabilities"). Employment of workers by state and local governments also confers benefits on those employed, but that hardly makes employment a public "service," "program," or "activity" within the meaning of Title II of the ADA. Pet. 16.

2. As we showed in the petition (at 13-18), there is substantial confusion in the lower courts over the scope of "programs," "services," and "activities." The Ninth Circuit's view that Title II applies to "anything a public entity does" so long as it is a "normal function of a government entity" brings within Title II numerous matters – including arrests, employment, and parental rights termination proceedings – that other courts have ruled are *not* programs, services, or activities of a public entity.

Respondents acknowledge (at 10-11) that the circuits "have split" over whether employment is a "program, service, or activity" covered by Title II of the ADA. They also admit that the lower courts "have struggled with the application of the ADA in the context of termination of parental rights proceedings." Br. in Opp. 10. And they agree (*id.* at 9-10) that the circuits are divided over whether arrests qualify as a "program," "service," or "activity." Respondents do not take issue with our showing that under the approach adopted by the Ninth Circuit in this case, arrests, employment, and termination proceedings would

all be covered by Title II and Section 504. In short, respondents make no effort to deny that the decision below conflicts, in result, with the decisions of other circuits and state courts.

Respondents confine their response to a tepid attempt to explain away the relevance of this case law. The cases involving the termination of parental rights, respondents say, "raise unique issues concerning the intended beneficiaries of the public entity's activity – issues that simply do not apply to public sidewalks." Br. in Opp. 10. "There is no question here," respondents add, "that the City's public sidewalks exist to benefit the general public." *Ibid.* There is no basis, however, for respondents' assumption that "programs," "services," or "activities" are limited to things that benefit the public at large as opposed to some group to whom the services are specifically targeted (such as the unemployed, the disabled, or the orphaned).

Equally meritless is respondents' contention that the employment cases are distinguishable because they involve "not whether public employment is covered at all, but which provision of the ADA appropriately governs this area." Br. in Opp. 10-11. "Determining whether Congress intended public employment to be addressed solely by Title I of the ADA," respondents maintain, "involves a focus on *the overall structure of the statute* * * * – [an] issue[] that simply *do[es] not arise* in addressing sidewalks." *Id.* at 11 (emphasis added).

That is mistaken. Structural evidence is as important in this case as in those cases. The fact that Title I of the ADA covers employment by public entities – and does so through provisions that are materially different from those applicable to Title II – strongly suggests that employment is not a "service," "program," or "activity" within the meaning of Title II. See *Zimmerman* v. *Oregon Dep't of Justice*, 170 F.3d 1169, 1176 (9th Cir. 1999) (describing various differences in the requirements applicable to claims brought under Title I and Title II), cert. denied, 531 U.S. 1189 (2001). Likewise here, any sensible interpretation of "programs," "services," and "activities" must also take into account the longstanding differential treatment of

existing and *new* facilities – a structural component of Title II and the accompanying regulations that the decision below eviscerates. See Pet. 29; Nat'l Ass'n of Counties Br. 2-3, 7-13; Calif. Cities Br. 4-5, 8-9, 13, 16; Nat'l League of Cities Br. 4-5, 12-14. Thus, respondents' efforts to distinguish the conflicting cases fails at every turn.[1]

3. Respondents emphasize (at 1, 8, 11) that the Ninth Circuit is the first appellate court in the Nation to resolve – or evidently even to entertain – the argument that a sidewalk is a public "program," "service," or "activity." Although that is certainly true, District Judge Milton Schwartz – who, alone among the four federal judges who considered this issue in this case, rested his decision on the *actual words* of the statute – came to the conclusion that a sidewalk is *not* a program, service, or activity. See Pet. 6-7; Pet. App. 9a.

More important, the Ninth Circuit's vanguard decision raises an obvious question: Why, if sidewalks or other forms of infrastructure are "programs," "services," or "activities," did it take so long for such a claim to be advanced in the state or federal courts? The Rehabilitation Act, after all, has been on the books for almost thirty years; the ADA, more than a decade. The answer, we submit, is that the argument is contrary to the plain language of those statutes, inconsistent with the traditional differential regulatory treatment of existing and new facilities,

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[1] Respondents claim (at 9) that *Rosen* v. *Montgomery County*, 121 F.3d 154 (4th Cir. 1997), "rested on * * * an implied requirement of voluntariness" which this Court rejected in *Yeskey*. Respondents misread *Rosen*, which turned primarily on the plain language of the ADA and not on any concept of voluntariness contained in the separate definition of the statutory term "qualified individual with a disability." See 121 F.3d at 157 ("calling a drunk driving arrest a 'program or activity' of the County * * * strikes us as a stretch of the statutory language and of the underlying intent"). The prior decision in *Torcasio* v. *Murray*, 57 F.3d 1340 (4th Cir. 1995), cert. denied, 516 U.S. 1071 (1996), did rely on the voluntariness concept, but the *Rosen* panel cited *Torcasio* only in passing as a "cf." citation. 121 F.3d at 157.

and (until this case) contrary to the Justice Department's guidance. No wonder the argument evidently has never been floated before this case. In any event, this Court has never insisted on a square circuit conflict before granting review to decide an issue of national importance. Several cases on this Court's docket this Term did not involve a square circuit conflict.[2]

II. THE ISSUE PRESENTED IS IMPORTANT

Although they admitted below that this case raises an issue of "profound" importance to the public (Resp. C.A. Reply Br. 2), respondents now attempt, in a variety of ways, to downplay the significance of the Ninth Circuit's decision. Respondents, however, got it right the first time – as strongly confirmed by the governmental and organizational *amici* supporting review.

1. Respondents take issue with the question presented as framed in the petition, criticizing it for mentioning "other forms of infrastructure owned by state or municipal governments" (Pet. i) when the only form of public infrastructure involved in the Ninth Circuit's decision was sidewalks. Br. in Opp. 18-19. But, if a sidewalk is a "service, "program," or "activity," then there is *no logical reason* why roads, bridges, buildings, and other types of physical infrastructure owned by States or municipal governments would not also qualify. As the National Association of Counties' *amicus* brief correctly points out (at 15), under the Ninth Circuit's reasoning "*any* municipally-owned item * * * can become a program, service or activity under the ADA" through the simple expedient of "placing the word 'maintaining' in front of" it. See also Pet. 20, 26.

2. Respondents argue that the decision below resolves only the "simple question" whether a local government has "*any* ob-

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[2] See, *e.g.*, *Entergy Louisiana, Inc.* v. *Louisiana Public Serv. Comm'n*, 71 U.S.L.W. 3483 (order granting certiorari, Jan. 17, 2003) (No. 02-299); *Eldred* v. *Ashcroft*, 123 S. Ct. 769 (2003); *Hillside Dairy Inc.* v. *Lyons*, 123 S. Ct. 769 (order granting certiorari, Jan. 10, 2003) (Nos. 01-950 and 01-1018); *City of Cuyahoga Falls* v. *Buckeye Community Hope Found.*, 122 S. Ct. 2618 (order granting certiorari, June 24, 2002) (No. 01-1269).

ligation" under the ADA and Rehabilitation Act "to take reasonable steps" to remove "barriers" that limit the access of people with "mobility and/or vision disabilities" to public sidewalks. Br. in Opp. 1 (emphasis added). Respondents are again mistaken. As we explained in the petition, petitioners have *already agreed* in this litigation to add to the number of existing curb ramps and curb cuts in Sacramento by building approximately 1500 new curb ramps each year. Moreover, petitioners do not dispute that the Justice Department's regulations impose obligations on the City in carrying out its program of constructing *new* sidewalks or in ensuring access to certain buildings where City programs, services, or activities take place. See Pet. 6 & n.3.

Thus, it is wrong to say that what is at stake is whether the City has "any obligation" to take reasonable steps to remove barriers to sidewalk access. What is at stake is whether the ADA requires the City to go beyond the many reasonable steps it has already taken and – unless the City can prove an undue burden defense in court – uproot trees, move benches and utility poles, and rebuild *existing* sidewalks throughout Sacramento.

In an effort to appear more reasonable, respondents at various points suggest that all the City is required to do under the ADA and the Rehabilitation Act is to make its overall "*system* of public sidewalks" reasonably accessible. Br. in Opp. 19 (emphasis added); see also *id.* at 20 (referring to the "issue of * * * program access along the public sidewalk *system*") (emphasis added). But if that were respondents' position, it is not clear why there was anything left to litigate after the City agreed to add 1500 curb ramps each year to the curb ramps and curb cuts already in existence.

3. Any doubt about the importance of the issue presented is eliminated by the three *amicus* briefs filed in this case. As the *amici* point out, the Ninth Circuit's decision threatens to impose an "enormous financial burden" on local governments as well as to raise "significant implementation issues" with respect to ADA compliance – issues that "greatly impact on the budgets of local governments." Nat'l Ass'n of Counties Br. 3; see also

id. at 12 ("extraordinarily costly effect"); Calif. Cities Br. 13-15 (describing "extraordinary magnitude" of cost of compliance); Nat'l League of Cities Br. 14 ("dire fiscal consequences").

The adverse consequences of the Ninth Circuit's decision are not limited to its fiscal effects. As the *amici* have persuasively demonstrated, the decision below undermines local autonomy by impairing the authority of local governments to make decisions about the timing and priority of changes to existing facilities. Nat'l Ass'n of Counties Br. 11-12, 17. The decision below also creates significant uncertainties about how it is to be implemented within the Ninth Circuit. See *id.* at 16-17.

4. The importance of the issue presented is underscored by *Krumel* v. *City of Fremont*, No. 8:01CV259, slip op. (D. Neb. Jan. 29, 2003), a suit brought by an individual town resident who suffered from various disabilities. The plaintiff claimed that the town, by failing to reposition various mailboxes that protruded over onto the town's sidewalks, had interfered with his ability to maintain an exercise program and healthy lifestyle and thus violated the federal disability discrimination laws. Relying largely on the Ninth Circuit's decision and reasoning in this case – including the proposition that "attempting" to analyze the statutory text would be "needless hair-splitting" – the district court denied the town's motion for summary judgment.

This decision is a clear sign of things to come if the decision below is allowed to stand. The City of Fremont must now endure a trial and final judgment before it will have the right to appeal the district court's ruling. That may take years; and there is no guarantee that the town will expend the substantial financial and political resources that would be required to litigate over principle, rather than settle. Cities, counties, and other municipal governments across the country can be expected to be subjected to a flurry of "infrastructure" lawsuits of the kind endorsed by the Ninth Circuit. This Court should act now to avoid the enormous waste of judicial and municipal resources that will otherwise ensue. Further "percolation" is not likely to

assist this Court in deciding this pure question of statutory construction, particularly given the disconcerting tendency of some lower courts (perhaps misreading this Court's decision in *Yeskey*) to abdicate responsibility for analyzing the words and structure of these important federal statutes.

III. THE DECISION BELOW IS WRONG

Respondents have no answer for most of the merits analysis in the petition (at 22-30). They make no effort to address our criticisms of the Ninth Circuit's "normal function" test. Pet. 23 & n.8. Nor do they offer any defense of the Ninth Circuit's failure to take account of the Justice Department's prior, contradictory guidance to public entities over the years. Pet. 28-29. And respondents do not respond to our showing (Pet. 27) that the regulation on which the Department relied below (28 C.F.R. § 35.150(d)(2)) does not, in fact, "require[] the provision of curb ramps," as the Ninth Circuit incorrectly believed. Pet. App. 7a. Instead, the regulation does nothing more than prescribe the content of a "transition plan" for certain types of public entities (those with more than 50 employees) when the public entity elects to "achieve program compliance" through "structural changes" in existing facilities rather than through other permissible methods. 28 C.F.R. § 35.150(b), (d)(2) (Pet. App. 29a-30a); Pet. 26-27; Calif. Cities Br. 8-12.[3]

At the end of they day, respondents' defense of the result below rests on two basic points: (1) the Rehabilitation Act's

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[3] As we have explained (Pet. 3-4), Congress in passing the ADA specifically directed that the Attorney General's implementing regulations relating to "program accessibility, existing facilities" – *i.e.*, what is now 28 C.F.R. § 35.150 – "*shall be consistent* with regulations and analysis as in Part 39 of title 28 of the Code of Federal Regulations." 42 U.S.C. § 12134(b) (emphasis added) (Pet. App. 25a-26a). The latter Rehabilitation Act regulations, however, do not *even mention* curb cuts, much less mandate them. Compare 28 C.F.R. § 35.150(d) with *id.* § 39.150(d). The government's new-found interpretation of 28 C.F.R. § 35.150(d)(2) as requiring the provision of curb cuts thus appears to be directly contrary to the command of 42 U.S.C. § 12134(b).

definition of "program or activity" includes "all of the *operations* of * * * a department, agency, * * * or other instrumentality of a State or of a local government" (29 U.S.C. § 794(b) (emphasis added)); and (2) the Ninth Circuit is not alone in refusing to analyze the operative language of these statutes and in concluding that the laws cover "anything a public entity *does*." Br. in Opp. 2-3, 6-7, 15-16. We have explained why those arguments are unavailing. Pet. 22-24.

IV. THIS CASE IS AN IDEAL VEHICLE

Respondents suggest (at 9, 20) that this case is a poor vehicle because it involves an interlocutory appeal. But, as it now stands, the case presents a threshold, significant question of law that was exhaustively briefed in, and squarely decided by, the court of appeals, with extensive *amicus* participation (see Pet. App. 2a). The absence of a complicated record makes this case ideal for resolving an issue of statutory interpretation. The question presented will not be illuminated by the parties' efforts to develop a factual record on the City's distinct defense of "undue burden." This Court has not hesitated to review interlocutory decisions of the federal courts of appeals in exactly this posture. See STERN, GRESSMAN, SHAPIRO & GELLER, SUPREME COURT PRACTICE 196 (8th ed. 2002); *Barnes* v. *Gorman*, 122 S. Ct. 2097 (2002); *TRW, Inc.* v. *Andrews*, 122 S. Ct. 441 (2001); *United Dominion Indus.* v. *United States*, 121 S. Ct. 1934 (2001); *United States* v. *Hatter*, 121 S. Ct. 1782 (2001).

The Ninth Circuit's decision threatens to impose severe burdens on local governments (a point underscored by the *amicus* briefs). Moreover, as we explained in the petition (at 20-22), and as *amici* confirm (Nat'l League of Cities Br. 17 n.6; Nat'l Ass'n of Counties Br. 15-17), the administrative burden exists even if a municipal government ultimately prevails on an undue burden defense. Respondents simply ignore these onerous administrative burdens.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 02-815

In the Supreme Court of the United States

CITY OF SACRAMENTO, CALIFORNIA, AND MIKE KASHIWAGI, DIRECTOR OF THE DEPARTMENT OF PUBLIC WORKS OF THE CITY OF SACRAMENTO, PETITIONERS

v.

JOAN BARDEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a city's provision, construction, and maintenance of a system of public sidewalks for its residents is a "program or activity" subject to the requirements of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, or a "service[]," "program[]," or "activit[y]" subject to the requirements of Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12132.

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In the Supreme Court of the United States

No. 02-815

CITY OF SACRAMENTO, CALIFORNIA, AND MIKE KASHIWAGI, DIRECTOR OF THE DEPARTMENT OF PUBLIC WORKS OF THE CITY OF SACRAMENTO, PETITIONERS

v.

JOAN BARDEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States in this case. The position of the United States is that the petition for certiorari should be denied because the court of appeals' decision below is correct; it does not conflict with any decision of this Court or of any other court of appeals; and, in light of the interlocutory posture of this case, petitioners' policy arguments concerning the potential fiscal and administrative burdens of complying with the decision below may be addressed on remand.

STATEMENT

1. a. Congress enacted the Americans with Disabilities Act (ADA) in 1990 as a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). In doing so, Congress found, *inter alia*, that "individuals with disabilities continually encounter various forms of discrimination," including "the discriminatory effects of architectural * * * barriers" and "failure to make modifications to existing facilities." 42 U.S.C. 12101(a)(5).

Title II of the ADA prohibits discrimination on the basis of disability by public entities. It provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. Title II was modeled closely on Section 504 of the Rehabilitation Act of 1973 (Section 504), which prohibits discrimination on the basis of disability "under any program or activity receiving Federal financial assistance." 29 U.S.C. 794(a).

b. The ADA directs the Attorney General to promulgate regulations to implement Title II based on regulations previously developed under Section 504. 42 U.S.C. 12134. Among other things, the Title II regulations provide that individuals with disabilities shall not be "denied the benefits of the services, programs, or activities of a public entity," "because a public entity's facilities are inaccessible to or unusable by individuals with disabilities." 28 C.F.R. 35.149. The Section 504 regulations establish a similar mandate. 28 C.F.R. 41.56. Both the Title II and Section 504 regulations

define "facility" to include "roads" and "walks." 28 C.F.R. 35.104; see 28 C.F.R. 41.3(f).[1]

Under the Title II regulations, the scope of the applicable accessibility requirements depends on whether a covered facility was constructed before or after January 1992. In general, the regulations require that "[e]ach facility" that is newly constructed or altered *after* January 1992 must be "readily accessible to and usable by individuals with disabilities." 28 C.F.R. 35.151(a) (newly constructed facilities); 28 C.F.R. 35.151(b) (altered facilities). And, in particular, the regulations provide that newly constructed or altered sidewalks and intersections must include curb ramps. 28 C.F.R. 35.151(e).

The Title II regulations impose a more generalized standard with respect to facilities covered by the ADA that were in existence in January 1992. Rather than applying the accessibility requirements to "[e]ach facility" that is covered (28 C.F.R. 35.151(a)), the regulations provide that a "public entity shall operate each service, program, or activity, so that the service, program, or activity, *when viewed in its entirety*, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. 35.150(a) (emphasis added). In addition, the regulations further provide that, even under this "entirety" approach, a public entity is not required "to take any action that it can demonstrate would result in * * * undue financial and administrative burdens." 28 C.F.R. 35.150(a)(3).

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[1] The ADA also directs the Attorney General to issue architectural standards for facility accessibility consistent with architectural "minimum guidelines and requirements" to be developed by the Architectural and Transportation Barriers Compliance Board (Access Board). 42 U.S.C. 12134(b), 12204(a).

The regulation governing existing facilities also provides that any "structural changes to facilities" necessary to comply with Title II were to be made in accordance with a transition plan. 28 C.F.R. 35.150(d)(1). In particular, the regulation provides that such a "transition plan shall include a schedule for providing curb ramps" on "walkways" controlled by the public entity, "giving priority to walkways serving entities covered by the Act, including State and local government offices and facilities, transportation, places of public accommodation, and employers, followed by walkways serving other areas." 28 C.F.R. 35.151(d)(2).

2. Respondents, Sacramento residents with disabilities, brought this action against the City of Sacramento, alleging that the City has built and maintained its public sidewalks in a manner that in places renders them inaccessible to individuals with mobility and vision impairments, in violation of Title II and Section 504. In particular, respondents alleged that the City failed to install curb ramps at intersections in newly constructed or altered streets; to remove obstacles making existing sidewalks unpassable or dangerous (*e.g.*, benches, signs, and wires protruding into walkways); and even simply to develop a transition plan to address such problems. C.A. App. 12-15.

a. The parties reached a settlement on the provision of curb ramps in newly constructed or altered streets, but could not agree on the scope of the City's obligation to make accessible obstructed stretches of existing public sidewalks. Pet. App. 3a. On cross-motions for summary judgment, the district court granted partial judgment for the City on "the issue of 'program access' as it relates to sidewalks," holding "that such sidewalks are not a program, service or activity of the City of Sacramento, and thus are not subject to the program

access requirements of the ADA or Section 504 of the Rehabilitation Act." *Id.* at 9a-10a & n.1. At the same time, however, the court certified its order pursuant to 28 U.S.C. 1292(b), for an interlocutory appeal. Pet. App. 10a.

b. The court of appeals reversed and remanded for further proceedings. Pet. App. 1a-8a. The court explained that prior circuit precedent had interpreted the ADA's "services, programs, or activities" language to "bring[] within its scope 'anything a public entity does.'" *Id.* at 5a (quoting *Lee* v. *City of Los Angeles*, 250 F.3d 668, 691 (9th Cir. 2001)). "[M]aintaining public sidewalks is a normal function of a city," the court observed, and "therefore falls within the scope of Title II" under that interpretation. *Id.* at 6a.

The court of appeals explained that its "construction of the [Title II's] phrase 'services, programs, or activities,' is supported by the plain language of the Rehabilitation Act because, although the ADA does not define 'services, programs, or activities,' the Rehabilitation Act defines 'program or activity' as 'all of the operations of' a qualifying local government." Pet. App. 6a (quoting 29 U.S.C. 794(b)). In addition, the court explained that its construction of Title II is supported by the Title II regulations. *Id.* at 7a-8a. Indeed, the court observed, the curb ramps mandated by the regulations "could not be covered unless the sidewalks themselves are covered." *Id.* at 8a. The court also pointed to the amicus brief filed by the United States in this case in support of appellees. *Id.* at 7a-8a.

The court of appeals remanded for additional proceedings concerning the scope of the City's compliance obligations under Title II and Section 504 with respect to its public sidewalk system. In particular, the court noted that, "[a]t trial, the City will have the opportu-

nity to present evidence concerning any 'undue financial and administrative burdens'" that might be imposed by the statutory accessibility requirements. Pet. App. 8a n.6.

DISCUSSION

Laying and maintaining a network of walkways, or sidewalks, for pedestrians to move about is one of the first and most elementary functions of a municipality. The court of appeals in this case held that the "public sidewalks in the City of Sacramento are a service, program, or activity" covered by Title II and Section 504. Pet. App. 2a, 8a. That decision is correct and consistent with the plain language of Title II and Section 504, a subsequent Act of Congress recognizing that "public sidewalks" are covered by the ADA, 23 U.S.C. 133(b)(3), and regulations issued by the Department of Justice. It does not conflict with any decision of this Court or of any court of appeals. And, indeed, there is no other reported decision of which we are aware addressing Title II's or Section 504's application to a city's public sidewalks. Accordingly, the customary grounds for granting certiorari are absent in this case.

Nor do the administrative or financial burdens hypothesized by petitioners and their amici of complying with Title II and Section 504 in the context of public sidewalks provide a basis for granting certiorari. Those concerns may be addressed by—and indeed are likely to be the focus of—the proceedings on remand. In remanding for further proceedings, the court of appeals specifically noted that the City may present evidence that modifying its sidewalks to comply with Title II's accessibility requirements would subject it to "undue financial and administrative burdens" that are not required under the Title II regulations. Pet. App. 8a

n.6. Presently, the record is devoid of any such evidence. The interlocutory posture of this case therefore presents an additional reason to deny review.

A. The Court Of Appeals' Decision Is Correct And Consistent With The Pertinent Statutory Provisions And Regulations

1. Both Title II of the ADA and Section 504 of the Rehabilitation Act prohibit covered public entities from denying individuals with disabilities "the benefits of" any "program" or "activity" or, in the case of Title II, any "service[]" of a covered entity on the basis of disability. 29 U.S.C. 794(a); 42 U.S.C. 12132. As this Court has recognized, those statutory terms are unambiguously broad. See *Pennsylvania Dep't of Corrs.* v. *Yeskey*, 524 U.S. 206, 212 (1998). Indeed, Title II was modeled on Section 504, and Section 504 states that "the term 'program or activity' means *all of the operations of*" a covered public entity. 29 U.S.C. 794(b) (emphasis added). Title II's use of "program[]" and "activit[y]" was intended to be just as broad as Section 504's use of those terms. See 42 U.S.C. 12201(a).[2]

In common parlance, Sacramento's provision of a system of sidewalks for pedestrians to move about for personal, commercial, or other reasons is a "service[]" that the City provides to its residents. Indeed, it is one of the most fundamental services provided by any municipality. The provision of that service is depen-

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[2] The dictionary definitions of the terms used by Congress confirm their breadth. "Activity" means a "natural or normal function or operation." *Webster's Third New International Dictionary* 22 (1993). "Program" means "a schedule or system under which action may be taken toward a desired goal." *Id.* at 1812. And "service" means the "supply of needs" or "utility" and "an act of administering or applying something." *Id.* at 2075.

dent on government "activities" ranging from the initial construction of the sidewalks to the maintenance of the sidewalks. And the provision of that service is undertaken as part of a "program[]" funded by the City and administered by its Public Works Department. When an individual with a disability is denied the use of the sidewalk system that Sacramento makes available to the public at large because sidewalks are inaccessible to individuals with disabilities, he or she is "excluded from," and "denied the benefits of," the "services, programs, or activities of a public entity." 42 U.S.C. 12132.

That conclusion is not nearly as startling as petitioners and their amici suggest. Providing and upkeeping a network of walkways for pedestrians to get around town is a quintessential, not to mention ages old, government service. Indeed, in other contexts, this Court itself has recognized the provision of sidewalks as an archetypal "general government service[]." *Everson* v. *Board of Educ.*, 330 U.S. 1, 17-18 (1947) (noting that there is no Establishment Clause difficulty in giving churches access to "such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks"); cf. *Madsen* v. *Women's Health Center, Inc.*, 512 U.S. 753, 768 (1994) (recognizing the "strong [state] interest * * * in promoting the free flow of traffic on public streets and sidewalks"). Sidewalks permit the public not only to stay clear of road traffic, but to access shops and businesses, means of public transportation, places of employment, and government offices and facilities.[3]

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[3] Sidewalks have long served an important public safety service. In earlier times, raised paths called "Side-walks" separated pedestrians from carriage ways. See *The Oxford English Dictionary* 493 (2d ed. 1989) ("The Side-walks for the Foot-passengers are

And for "time out of mind," sidewalks have been used for the purpose of public association and speech. *Boos* v. *Barry*, 485 U.S. 312, 318 (1988) (quoting *Hague* v. *CIO*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.)).

Nor was the Congress that enacted the ADA oblivious to the natural reach of the broad terms that it used in Title II. For example, the House Report accompanying the Act explained that under Title II, "local and state governments are required to provide curb cuts on public streets" because the "employment, transportation, and public accommodation sections of this Act would be meaningless if people who use wheelchairs were not afforded the opportunity to travel on *and between* the streets." H.R. Rep. No. 485, 101st Cong., 2d Sess., Pt. 2, at 84 (1990) (emphasis added). Similarly, hearing testimony established that one of the greatest barriers that individuals with disabilities faced in participating in the economic life of communities was the inability to use transportation systems, including sidewalks, to reach places of employment and commerce.[4]

. . . raised about a Foot above the Carriage-way.") (quoting Labelye, *Piers Westminister Bridge* 69 (1739)). Today, sidewalks separate pedestrians from automobile traffic.

[4] See, *e.g.*, *Americans with Disabilities Act of 1989: Hearings on H.R. 2273, Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 248 (1989) (survey identified "availability of curb cuts" as a "major problem[]" for individuals with disabilities); *ibid.* ("[d]isabled citizens are forced to stay home or use the street, because curb cuts and sidewalks are absent or inadequate"). Similarly, Appendix C to Justice Breyer's dissenting opinion in *Board of Trustees* v. *Garrett*, 531 U.S. 356, 391-424 (2001), contains numerous examples of asserted discrimination by state and local governments concerning the condition of public sidewalks and, most notably, a lack of curb ramps, which were presented to a congressionally appointed ADA task force.

Moreover, in subsequent legislation, Congress has explicitly recognized that "public sidewalks" are covered by Title II. Section 1108 of the Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107 (23 U.S.C. 133(b)(3)), which was passed in 1998, authorizes the use of federal funds set aside for transportation improvements undertaken by the States for "the modification of public sidewalks to comply with the Americans with Disabilities Act of 1990."

Petitioners acknowledge (Pet. 6, 25) that the *construction and maintenance* of sidewalks constitutes a covered "program, service, or activity," but object (Pet. 25) that the court of appeals "did not require the City to *do* anything before its sidewalks would be deemed covered." But the application of Title II and Section 504 to public sidewalks does not turn on whether, or when, a city chooses to fill in the cracks in a particular stretch of sidewalk. More to the point, the maintenance necessary to keep the public sidewalk system functioning is not undertaken for its own sake, but only as a component of the basic government service of providing a freely and safely passable system of walkways for pedestrians in the first place.[5]

2. The court of appeals' decision is also consistent with the Title II regulations promulgated by the Department of Justice. As discussed above, those regulations provide that no one with a covered disability

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[5] Petitioners' position appears to be that basic government infrastructure, like streets and sidewalks, cannot constitute a service or activity covered by Title II, and that only the process of upkeep for such facilities may constitute such a service or activity. But, as noted above, this Court itself has recognized that the provision of, not just the upkeep of, facilities like parks, streets, and sidewalks is a "general government service[]." *Everson*, 330 U.S. at 17-18.

"shall, because a public entity's facilities are inaccessible to or unusable by individuals with disabilities, be excluded from participation in, or be denied the benefits of the services, programs, or activities of a public entity." 28 C.F.R. 35.149. And the regulations specifically define "facility" to include "roads" and "walks" controlled by a public entity. 28 C.F.R. 35.104.

Furthermore, the Title II regulations recognize the ADA's application to public sidewalks in particular. The regulations provide that newly constructed or altered streets and pedestrian walkways "must contain curb ramps," 28 C.F.R. 35.151(e), and require public entities with responsibility over existing sidewalks to develop a transition plan for installing curb ramps by a certain date, 28 C.F.R. 35.150(d)(2).

The fact that the regulations address only one specific aspect of sidewalk accessibility—*i.e.*, curb ramps—does not undermine the conclusion that the provision and maintenance of a sidewalk system *in general* is a covered service, program, or activity under Title II. As the court of appeals noted, the curb ramp requirements "would be meaningless if the sidewalks between the curb ramps were inaccessible." Pet. App. 7a. Moreover, if a city's system of public sidewalks were *not* a covered service, program, or activity, there would be no basis (in the ADA) for imposing *any* program accessibility requirements with respect to a city's public sidewalk network, including curb ramps.

To be clear, the Title II regulations are premised on the view that a public sidewalk system is a covered service, program, or activity under Title II. See 60 Fed. Reg. 58,462, 58,463 (1995) (observing that curb ramp requirements for existing sidewalks were premised on the view that "maintenance of pedestrian walkways by public entities is a covered program") (notice of pro-

posed rulemaking). That position, embodied in the Department of Justice's regulations implementing Title II, is entitled to substantial deference. See *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

Petitioners and their amici argue that the Title II regulations require a city to modify its public sidewalks only to the extent necessary to permit access to *other* government programs or services, such as schools or libraries. That is incorrect. Indeed, the regulations explicitly require a public entity to adopt a transition plan that prioritizes installing curb ramps not only in "walkways serving entities covered by the Act, including State and local government offices and facilities," but *also* in walkways serving "transportation, places of public accommodation, and employers, followed by walkways serving other areas." 28 C.F.R. 35.150(d)(2). Nor, as explained above, do the broad statutory terms used by Congress in Title II square with the notion that Congress intended to limit the coverage of the ADA to a haphazard patchwork of sidewalks adjacent to government buildings or facilities.[6]

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[6] Petitioners assert (Pet. 28-29) that the government's position in this case is inconsistent with informal guidance letters issued by the Department of Justice. That is incorrect; those letters, too, recognize that Title II and Section 504 extend to a municipality's public sidewalks. See, *e.g.*, Letter from S. Oneglia, Chief of Coordination and Review Section, Civil Rights Div., to P. Kelley (Feb. 17, 1994) ("[I]f a public entity has responsibility for, or authority over, sidewalks or other public walkways, it must ensure that such sidewalks and walkways meet the program access requirement and, when viewed in their entirety, are readily accessible to and usable by individuals with disabilities."); Letter from J. Wodatch, Chief of Disability Rights Section, Civil Rights Div., to R. Daniels (Apr. 8, 1996) ("residential sidewalks that are constructed with the expectation that they will be turned over to the local government

B. The Court Of Appeals' Decision Does Not Conflict With Any Decision Of This Court Or Of Any Other Court Of Appeals

1. Petitioners assert (Pet. 12) a conflict between the Ninth Circuit's decision below and this Court's decision in *Pennsylvania Department of Corrections* v. *Yeskey*. There certainly is no direct conflict between the cases: in *Yeskey*, this Court held only that Title II of the ADA "extends to state prison inmates." 524 U.S. at 213. Petitioners assert a much more generalized conflict, arguing that, whereas in *Yeskey* this Court "focus[ed] on the plain meaning of the statutory terms," the Ninth Circuit "expressly declined to analyze the operative language of the ADA and the Rehabilitation Act." Pet. 10, 12. That is not an accurate characterization of the Ninth Circuit's decision. Although the Ninth Circuit referred to prior circuit precedent construing "the ADA's broad language [as] bring[ing] within its scope 'anything a public entity does,'" Pet. App. 5a, the court ultimately explained that its conclusion that "maintaining public sidewalks" is a covered service, program, or activity under Title II squares with the "plain language" of the statutory terms repeated and defined in the Section 504. *Id.* at 6a; see *ibid.*

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are required [under the ADA] to be accessible to people with disabilities"). Moreover, to the extent that petitioners believe that some informal letters support a different interpretation, the letters quoted above are only one reflection of a position that has been consistently expressed in other, more formal publications of the government, including the regulations discussed above. See, *e.g.*, 60 Fed. Reg. 58,462, 58,463 (1995) (notice of proposed rulemaking); Access Board, *Accessible Rights-of-Way: A Design Guide* 18 (1999); see also *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997); *United States* v. *Mead Corp.*, 533 U.S. 218, 228 (2001).

In any event, any difference in the general interpretive approach of the cases does not provide a basis for granting certiorari. "This Court 'reviews judgments, not statements in opinions.'" *Johnson* v. *De Grandy*, 512 U.S. 997, 1003 n.5 (1994) (quotations omitted). As explained above, the court of appeals' decision is consistent both with the text of Title II and the implementing regulations. Any statements in the decision below indicating that the Ninth Circuit has adopted an unduly expansive approach to interpreting the ADA do not alter the correctness of the result that the court reached in this case and, therefore, do not provide a basis for reviewing its decision in this case.[7]

2. Nor does the Ninth Circuit's decision conflict with the decision of any other court of appeals. Indeed, petitioners point to no other published decision addressing whether a system of public sidewalks is subject to the accessibility requirements of Title II or Section 504. And the only federal court of which we are aware that has addressed that issue specifically *agreed*—in an unpublished decision—with the Ninth Circuit's decision in this case and held that "city sidewalks, owned by the city and over which it has assumed law enforcement jurisdiction to ensure unobstructed public use, are a 'service, program or activity' within the meaning of the ADA." *Krumel* v. *City of Fremont*, No. 8:01CV259 (D. Neb. Jan. 29, 2003), slip op. 6. Particularly in light of

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[7] In fact, *Yeskey* supports the result reached by the court of appeals below. The Court in *Yeskey* observed that a "prison law library, for example, is a *service* (and the use of it an activity)." 524 U.S. at 211 (emphasis added). It would be anomalous as a matter of both statutory interpretation and common sense to conclude that the Congress that enacted the ADA intended to ensure that individuals with disabilities would enjoy access to a prison law library, but not the public sidewalks.

the unique importance that petitioners and their amici themselves attach to Title II's application to *public sidewalks*, the absence of any other reported decision addressing Title II's application to public sidewalks, much less any circuit conflict on that issue, itself counsels strongly against granting review in this case, the very first reported decision on point.

Underscoring the absence of any genuine circuit split necessitating resolution by this Court, petitioners speculate that the general interpretative approach of the Ninth Circuit in this case would lead it to hold that Title II and Section 504 apply to matters such as arrest procedures, public employment, and even proceedings involving the termination of parental rights, in conflict with the decisions of other circuits. See Pet. 13-18. There is no reason to believe that a circuit conflict on those distinct issues is inevitable.[8] But in any event, the mere prospect that a conflict *might* develop among the courts of appeals in the context of arrests, employment, or parental rights provides no reason to grant review here to consider Title II's and Section 504's application to a city's system of public sidewalks.

C. The Interlocutory Posture Of This Case Is Itself A Sufficient Reason To Deny Certiorari

Even when a threshold liability determination presents an important federal question, this Court will "generally await final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia*

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[8] Indeed, while petitioners hypothesize (Pet. 16) that the general interpretive approach of the Ninth Circuit in this case would lead the court to hold that employment is covered by Title II, they concede that the Ninth Circuit has in fact already reached the *opposite* conclusion. *Zimmerman* v. *Oregon Dep't of Justice*, 170 F.3d 1169, 1174 (9th Cir. 1999), cert. denied, 531 U.S. 1189 (2001).

Military Inst. v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of certiorari). The court of appeals below held only that the City's public sidewalks are covered by Title II and Section 504 as a threshold matter; it made no determination concerning the specific requirements that Title II or Section 504 impose on the City with respect to its public sidewalk system, nor even that the City's sidewalks are in any way deficient under Title II or Section 504. Instead, the court remanded for further proceedings concerning those key questions. Pet. App. 8a & n.6. The current interlocutory posture of this case thus provides an independent reason to deny review.

Moreover, in light of the procedural posture of the case, the policy arguments made by petitioners and their amici concerning the potential practical implications of the court of appeals' decision do not provide any reason to grant review at this time. As respondents point out (Br. in Opp. 8), "[b]ecause this case was presented on interlocutory appeal, * * * no evidence has been taken regarding what the City of Sacramento is required to do in order to provide program access to the [city's] system of public sidewalks." Nor is there any "evidence in the record regarding the exact extent of the barriers [that might violate Title II or Section 504], or the cost of removing any such barriers." *Ibid.*

Furthermore, in at least two key respects, the regulatory regime addresses the overriding financial and administrative concerns raised by petitioners and their amici. First, with respect to existing sidewalks, the Title II regulations require only that the City's *system* of public sidewalks—when viewed "in its entirety"—be generally accessible to and usable by individuals with disabilities. 28 C.F.R. 35.150(a)(1). As a result, petitioners are incorrect in stating that "Sacramento must

undertake to make *each* sidewalk accessible," Pet. 19 (emphasis added), much less that "every sidewalk * * * [in] the Ninth Circuit arguably must now be made ADA-compliant." *Ibid.*

Second, with respect to existing sidewalks, the City is not required to take any action that would result in undue financial or administrative burdens. 28 C.F.R. 35.150(a)(3); see *Olmstead* v. *L.C.*, 527 U.S. 581, 603-606 (1999). Thus, there is no reason to presume that the decision below will impose a "staggering" (Pet. 10) financial burden on Sacramento. Nor is there any basis to assume that the lower courts on remand will ignore that important regulatory safety valve and impose the sort of extravagant demands hypothesized by petitioners and their amici. See Pet. 19. Indeed, in remanding for further proceedings, the Ninth Circuit itself emphasized that the City will have an opportunity "to present evidence concerning any 'undue financial and administrative burdens'" that might be exacted by complying with Title II or Section 504. Pet. App. 8a n.6.[9]

At the same time, it is likely that many basic impediments to sidewalk access could be removed by the City at relatively small burden or expense. For example, common barriers to sidewalk access by those with disabilities include newspaper boxes, benches, or plant growth that likely could be moved to widen sidewalks to allow wheelchair access or eliminate obstacles posing

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[9] There may be other limitations on the scope of a city's obligations under Title II and Section 504 when it comes to sidewalks. For example, the Title II regulations impose accessibility requirements only with respect to sidewalks that "a public entity has responsibility or authority over." 28 C.F.R. 35.151(d)(2). Under state or local law, however, some sidewalks may be owned or controlled by a homeowners' association or the like. See, *e.g.*, Fla. Stat. Ann. § 316.00825 (West Supp. 2003).

a danger to visually impaired pedestrians without great effort or expense. In addition, in the case of obstacles that are more difficult to remove or structural flaws, a court might conclude that a city's adoption of a plan designed to address such flaws over a reasonable period of time was sufficient to comply with Title II and Section 504. Certainly, the existence of some potentially costly modifications should not provide an excuse for failing to make less costly adjustments, especially in light of the regulatory exception that exists for alterations that would entail *undue* financial burdens.[10]

Denying review of the interlocutory decision in this case will "not, of course, preclude [petitioners] from raising the same issues in a later petition, after final judgment has been rendered." *Virginia Military Inst.*, 508 U.S. at 946. Awaiting a final judgment, however, would provide this Court with a concrete record on which to evaluate the practical implications of the court of appeals' decision and, thus, a better platform from which to gauge the need for this Court's review.

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[10] To be sure, even these compliance responsibilities may impose unwelcome costs on cities with public works budgets that are already stretched thin. But in enacting the ADA, Congress made a determination that the societal benefits of promoting community access to those with disabilities outweigh the societal costs of complying with the ADA. See 42 U.S.C. 12101(a)(9); H.R. Rep. No. 485, 101st Cong., 2d Sess., Pt. 3, at 49-50 (1990) ("While the integration of people with disabilities will sometimes involve substantial short-term burdens, both financial and administrative, the long-range effects of integration will benefit society as a whole.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the Supreme Court of the United States

CITY OF SACRAMENTO AND MIKE KASHIWAGI, DIRECTOR OF THE DEPARTMENT OF PUBLIC WORKS OF THE CITY OF SACRAMENTO, IN HIS OFFICIAL CAPACITY,

Petitioners,

v.

JOAN BARDEN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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SUPPLEMENTAL BRIEF FOR PETITIONERS IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

It should surprise no one that the Department of Justice – having filed an amicus brief in the Ninth Circuit supporting respondents – now urges denial of review in this Court. What *is* surprising, however, is that the Solicitor General has chosen to address an issue that is materially *different* from the question decided by the Ninth Circuit and raised in our petition:

> Whether a city's ***provision, construction, and maintenance*** of a ***system*** of public sidewalks for its residents is a "program or activity" subject to * * * Section 504 of the Rehabilitation Act * * * or a "service[]," "program[]," or "activit[y]" subject to * * * Title II of the [ADA] * * *.

U.S. Br. I (emphasis added); compare Pet. i. But the Ninth Circuit held that the *sidewalks* – not the overall *system* of sidewalks – are a service, program, or activity. See Pet. App. 2a ("We must decide whether public sidewalks in the City of Sacramento are a service, program, or activity of the City * * *. We hold that they are * * *.").[1]

Equally perplexing, the Ninth Circuit did not pass on (and our petition therefore does not raise) the question whether Sacramento's combined "provision, construction, and maintenance" of sidewalks qualifies as a public program. The court of appeals did not decide whether "construction" is a program or activity because petitioners admitted that it was – and agreed, as part of the City's construction program and activities, to install curb ramps at intersections when resurfacing or altering city streets

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[1] See also Pet. App. 3a (describing issue debated by the parties, and holding of district court, as involving "whether sidewalks are a service, program, or activity within the meaning of the ADA"); *id.* at 3a n.2 (noting that respondents "represented to the district court that a holding that *sidewalks* are not a service or program negated their theory of the case ") (emphasis added); *id.* at 5a, 8a.

and when building new roads and sidewalks. Nor did the Ninth Circuit decide whether "maintenance" is a program or activity (again, petitioners agreed that it is, and acknowledged that the City could not, for example, discriminate against mobility-impaired residents in its maintenance program or activities by categorically refusing to repair dangerous conditions that arise on the City's curb ramps).[2] The only issue actually decided by the Ninth Circuit is whether the mere ownership – or, in the Solicitor General's carefully chosen terminology, "provision" – of sidewalks is an activity, program, or service.

The distinction is important. Major consequences flow from the difference between treating a *system* of sidewalks as a service, program, or activity and treating the sidewalks *themselves* as a service, program, or activity. As the Solicitor General notes, if the relevant service, program, or activity is the overall *system* of sidewalks, then only that system need be "*generally* accessible to and usable by individuals with disabilities" when "viewed 'in its entirety.'" U.S. Br. 16 (emphasis added) (quoting 28 C.F.R. § 35.150(a)(1)).[3] Under the Ninth Circuit's

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[2] The Ninth Circuit did mention maintenance. In a leap of logic that the Solicitor General makes no effort to defend, the Ninth Circuit reasoned that, because Sacramento "maintain[s]" its sidewalks (by complying with the limited duty under state law to remediate dangerous conditions), the City is under a federal duty to "*maintain[] their accessibility*" to all members of the respondent class. Pet. App. 6a (emphasis added). That conclusion, however, necessarily reflects the Ninth Circuit's holding that the *sidewalks themselves* are a program, service, or activity subject to the "program accessibility" requirements. See 28 C.F.R. § 35.150(a) (requiring "*each* service, program or activity" to be "operate[d]" so that it is "readily accessible and usable" to people with disabilities) (emphasis added). Under the Ninth Circuit's pretzel logic, *any* type of existing facility could be converted into a program, service or activity, so long as the facility is – like most public facilities – "maintained."

[3] Even then, major problems would remain. The Access Board has set no accessibility standards – other than those pertaining to curb cuts – for existing sidewalks or systems of sidewalks, leaving municipalities and courts completely at sea as to how far a city must go in making its

holding that the *sidewalks themselves* are services, programs, or activities, by contrast, it would appear that the accessibility of each and every sidewalk is a fair subject for litigation, mitigated only by the "undue burden" defense.

There is a reason for the Solicitor General's effort to change the terms of debate. By combining items that qualify as programs or activities (construction or maintenance) with those that do not (ownership of sidewalks or other forms of infrastructure), he seeks to deflect the Court's attention from the basic incompatibility of the Ninth Circuit's holding with the statutory text. And by addressing only a milder (though still incorrect) version of the Ninth Circuit's actual holding, the Solicitor General is able to make the decision below seem less radical than it really is, and to offer the Court soothing reassurances that the decision below "is not nearly as startling as petitioners and their amici suggest." U.S. Br. 8. Whether the decision is just a little startling (as the Solicitor General suggests), or startling in the extreme (as organizations representing thousands of cities, counties, and other local governments have told this Court in three important amicus briefs), it is wrong, it is overbroad – as the Solicitor General seems to concede in passing, U.S. Br. 14 – and it threatens ruination of this Nation's cities in the absence of immediate review.

"system" of sidewalks "generally" accessible. Cf. ACCESS BOARD, ACCESSIBLE RIGHTS-OF-WAY: A DESIGN GUIDE Chapter 3.2 (1999) (22 pages of design specifications for *new* sidewalks). The facts of this case starkly illustrate the problem – petitioner believes that the settlement already entered into ensures that Sacramento's *system* of sidewalks will be generally accessible, but respondents have continued to litigate their theories that the City must do more. The courts below would have nothing to look to in deciding whether Sacramento's "system" must be modified, even if they follow the Solicitor General's suggestion that only the "system" must be made accessible and not the Ninth Circuit's holding that each sidewalk is itself a service, program, or activity governed by Title II. These imponderable issues are better addressed by adhering to the heretofore-settled distinction between facilities and programs. See Nat'l League of Cities Br. 4-5, 12-14; Nat'l Ass'n of Counties Br. 2-3, 7-13.

At the end of the day, it is far from clear that the Solicitor General really believes that only the overall "system" of sidewalks must be made accessible under the ADA and Rehabilitation Act. He states that the ADA is violated "[w]hen an individual with a disability is denied the use of the sidewalk system * * * because sidewalks are inaccessible." U.S. Br. 8. That statement suggests that, in the more typical case (such as *Krumel*, see U.S. Br. 14-15) brought by an individual plaintiff who is complaining about particular obstructions on specific sidewalks near his home, it would be no defense for the municipal government to say that the overall "system" is accessible even if these particular sidewalks are not.

On the merits, the Solicitor General has no convincing answer to the major points made in the petition and the amicus briefs, and the few new arguments he adds are wrong. Most disturbing is the his cavalier treatment of prior Department of Justice guidance, on which cities have relied in making budgetary decisions of great consequence, that existing sidewalks are covered by Title II of the ADA *only* "if such sidewalks are necessary to ensure accessibility to the entity's programs, services, or activities." Pet. App. 33a; see also Pet. App. 34a-35a; California Cities Br. 12 n.7. Those publicly available guidance letters – which indisputably presuppose that the sidewalks are not *themselves* programs, services, or activities – were signed by the *head of the Civil Rights Division*. Yet the Solicitor General dismisses them in a footnote as mere "informal letters" and cites letters from *subordinate* officials in supposed contradiction of the letters on which we rely. U.S. Br. 12 n.6.[4] This is not good government. Whatever the state of the law on deference to

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[4] The letters from subordinates do not, in any event, support the Ninth Circuit's holding. The 1996 letter from "J. Wodatch" that the Solicitor General cites refers only to *newly constructed* sidewalks, whereas the issue in this case concerns *existing* sidewalks. The 1994 letter from "S. Oneglia" that the Solicitor General cites says only that sidewalks "when viewed in their entirety" must be made accessible, whereas the Ninth Circuit put no such qualification on its holding.

government pronouncements (see Pet. 26-30), it borders on the unconscionable for the federal government to "discover" more than a decade after the ADA was passed that Title II applies to all sidewalks (or at least all systems of sidewalks), visit the huge fiscal consequences of that discovery on the Nation's cities, and dismiss prior, inconsistent guidance from the highest levels of the Justice Department as merely "informal."

No less stunning is the Solicitor General's willingness to join the Ninth Circuit in relying on regulations pertaining to *curb cuts* as support for imposing on cities obligations that go *far beyond curb cuts*. As we explained in the petition, the parties have reached a settlement with regard to the City's obligation to install curb cuts. What remains in litigation is respondents' insistence (see Pet. 19) that the City alter, reconfigure, or even rebuild its *existing* sidewalks to widen surfaces; move benches, fire hydrants, utility poles, traffic signal poles, telephone poles, trees, newspaper racks, guide wires, mailboxes, and other package service receptacles; eliminate roots and other protruding objects that might present an obstacle to individuals in wheelchairs or with vision impairments; and eliminate all abrupt changes in level of more than ¼ inch (or ½ inch if the change in level is beveled), including flares and cross slopes where private driveways cross sidewalks.[5] The relevant regulations, 28 C.F.R. §§ 35.150-35.151, "address [only] curb ramps," as the Ninth Circuit acknowledged. Pet. App. 8a. And, as we have explained (Pet. 26-27), those regulations as relevant to existing facilities require only "transition plans." The Ninth

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[5] The Solicitor General misleadingly suggests that most of what this litigation is about is relatively easy-to-remove obstacles such as benches, signs, protruding wires, and plant growth. U.S. Br. 4, 17-18. Yet, in respondents' own words (Resp. C.A. Br. 9), "Other barriers require greater effort to remedy, such as utility poles that narrow the sidewalk and thus block access. One of the most common barriers involves excessive slope or cross slope conditions, often created by driveways, along the length of the sidewalk * * *." Changing the level of a sidewalk is an expensive proposition, which in some cases will require tearing out and replacing an entire existing stretch of sidewalk.

Circuit's notion that transition plans for curb ramps "would be meaningless if the sidewalks between the curb ramps were inaccessible" (Pet. App. 7a) runs roughshod over the pragmatic compromises that lie at the heart of Title II of the ADA as applied to existing facilities. See Nat'l League of Cities Br. 9-10. The Solicitor General does not expressly repeat the Ninth Circuit's error in extending the regulations far beyond their actual coverage, but neither does he acknowledge the extension and provide any – let alone a plausible – defense of it.[6]

The Solicitor General also joins the Ninth Circuit in obliterating the critical distinction between *facilities* and *programs* under the relevant statutes. The Solicitor General admits without hesitation that sidewalks are *facilities*. U.S. Br. 2-3, 11 (citing 28 C.F.R. § 35.104). The concept of "program accessi-

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[6] Disturbingly, however, the Solicitor General twice relies on a notice of proposed rulemaking found at 60 Fed. Reg. 58,462 (1995). U.S. Br. 11, 13 n.6. The cited notice of proposed rulemaking suggested that cities should get *relief* from the excessively onerous deadlines provided by 28 C.F.R. § 35.150 (the regulation cited in the text above) for installing *curb cuts*. Among other things, the Department of Justice noted cities' "strained fiscal resources" (60 Fed. Reg. at 58,463), and "the limitations on available public funds" (*id.* at 58,464). The same notice reiterated that "[p]ublic entities * * * are not necessarily required to make each of their existing facilities accessible." *Id.* at 58,463. Cities reasonably read this notice of proposed rulemaking as a recognition of the *limitations* on their responsibilities, not as the Justice Department's effort to declare that they have – and have always had – extraordinarily broad responsibilities with respect to *existing* facilities of the sort this lawsuit seeks to impose. Furthermore, the only sentence the Solicitor General actually quotes from this notice of proposed rulemaking (U.S. Br. 11) says that "*maintenance* of pedestrian walkways by public entities is a covered program that is required to be made accessible by the installation of curb ramps." 60 Fed. Reg. at 58,462 (emphasis added). (The Solicitor General both truncates the sentence to make it appear to apply to more than curb ramps, and cites it to the wrong page.) Of course, we have conceded that *maintenance* of public sidewalks is covered by Title II of the ADA, see Pet. 6, 25-26, so the sentence the Solicitor General quotes is not at all inconsistent with our position.

bility" (see generally Nat'l Ass'n of Counties Br. 7-9) is a government construct designed precisely to ensure that covered entities make *programs* accessible, not every existing *facility*. See 28 C.F.R. Part 35, App. A, at 534 ("Program accessibility has proven to be a useful approach * * * [and] will continue to apply with respect to facilities now in existence, because the cost of retrofitting existing facilities is often prohibitive.").[7] If an existing *facility* can also be deemed a *program*, however, then the facility must be modified to provide access to the "program" consisting of itself, and the key concept of program accessibility has been rendered nonsensical.

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[7] See also ACCESS BOARD, ACCESSIBLE RIGHTS-OF-WAY: A DESIGN GUIDE 20-21 (1999):

> The concept of program accessibility has been widely misunderstood. Derived from regulations implementing the Rehabilitation Act of 1973, the idea of providing access to programs – not just to facilities – permits a broader and more flexible range of solutions to existing access problems. * * * [E]xisting facilities do not have to be made accessible if other means of providing access are effective. Except for the installation of curb ramps – which are specifically required for program access – structural changes are an option of last resort.

At the end of a long footnote, the Solicitor General cites page 18 of this same DESIGN GUIDE as supposed support for his position. U.S. Br. 13 n.6. Page 18, however, says, "certain **existing** pedestrian routes must be retrofitted with curb ramps," and "[i]t is a measure of their importance to accessible pedestrian circulation that curb ramps are the only construction item expressly required in the title II regulation" (emphasis in original). Those statements are far more consistent with petitioners' position than with the Solicitor General's. Notably, respondents have not relied on this publication – the federal government's most comprehensive pronouncement about cities' obligations with respect to sidewalks – at all. The Court may fairly infer that the DESIGN GUIDE supports petitioners' position more than respondents' – and indeed it does. *E.g.*, DESIGN GUIDE 15 ("The *construction, alteration, or maintenance* of the public rights-of-way" – all of which we concede are covered, but not the mere *provision* of existing sidewalks – "is an activity of a public entity and is therefore subject to the nondiscrimination requirements.").

The Solicitor General adds a new wrinkle by suggesting that 23 U.S.C. § 133 – Section 1108 of the Transportation Equity Act for the 21st Century, known as "TEA-21" – constitutes Congress's "explicit[] recogni[tion] that 'public sidewalks' are covered by Title II." U.S. Br. 10. But we acknowledge that public sidewalks are *sometimes* subject to requirements under Title II – the settlement already reached between the parties, indeed, requires the City of Sacramento to undertake extensive efforts with regard to sidewalks in the name of compliance with Title II. Our position is that sidewalks are covered as "facilities" and are subject to requirements *only* when they are newly constructed, altered, or maintained or are in need of modification (generally curb cuts) to provide access to some public program, service, or activity as required by 28 C.F.R. § 35.150. TEA-21 provides funding to offset some of the cost of compliance with the obligations that *are* imposed by the ADA with respect to sidewalks, but is no justification for expanding cities' sidewalk obligations beyond the ADA's terms.

The real significance of TEA-21 lies in its confirmation of our predictions about the enormity of the fiscal burden sidewalk modification places on cities. "TEA-21 clarified that accessibility improvements to pedestrian facilities are eligible for funding under the Surface Transportation Program. Approximately *$33 billion* is authorized over the six years of the program (1998-2003) for sidewalk improvements to comply with the Americans with Disabilities Act." DESIGN GUIDE 16 (emphasis added). That amount of money is necessary just to subsidize compliance with the sidewalk obligations that the ADA really does impose and the Access Board spells out in the DESIGN GUIDE; the *additional* cost of complying with the sidewalk obligations that the Ninth Circuit has read into the ADA is staggering. Such obligations should not be foisted on the Nation's cities without review by this Court.

The Solicitor General also contends that sidewalks *must* qualify as a program, service, or activity because otherwise "there would be no basis (in the ADA) for imposing any

program accessibility requirements with respect to a city's public sidewalk network, including curb ramps." U.S. Br. 11. That is simply untrue. The ADA would still impose obligations on cities to take steps to make their sidewalks accessible where necessary to ensure access to public programs or services offered in adjacent buildings. And the ADA would still impose a duty on public entities not to "den[y] the benefits of" their construction activities or programs to persons with disabilities by failing to incorporate curb ramps or curb cuts in newly constructed sidewalks. See 42 U.S.C. §§ 12132, 12146.

Finally, the Solicitor General urges the absence of a square conflict on the circuits *with respect to sidewalks* and the interlocutory posture of the case as reasons to deny review. U.S. Br. 13-18. (The Solicitor General does not deny that the circuits are in conflict with regard to the correct analytic approach to identifying covered programs, services, or activities, see Pet. 13-16, but he insists that only a decision with respect to sidewalks would create a "genuine circuit split," U.S. Br. 15.) In this respect, he merely makes the same arguments respondents made in their brief in opposition, and we adequately answered those arguments in our reply brief (at 3-6, 10).

* * * * *

This case involves *existing* sidewalks, which under the statutory and regulatory framework are to be treated very differently from new construction and alteration. See Nat'l Ass'n of Counties Br. 11-13; DESIGN GUIDE 18, 20-23. The Solicitor General pays inadequate heed to that distinction. Even worse, the Ninth Circuit – whose decision, not the Solicitor General's brief, is before this Court for review – belittled all distinctions necessary to define "services, programs, or activities" (42 U.S.C. § 12132) as "needless 'hair-splitting'" (Pet. App. 6a) and held that Title II applies to "anything a public entity does" (Pet. App. 5a). It is no wonder that the Nation's municipalities have poured out in amicus briefs urging this Court to grant review. It is a shame, but not a surprise in light of the position taken below, that the Solicitor General has chosen to leave the munici-

palities in the lurch and defend the decision below. The Solicitor General can do so, however, only by rewriting the question presented, belittling prior solemn announcements by high officials of the Department of Justice, obscuring key distinctions, and relying on makeweight arguments such as his invocation of 23 U.S.C. § 133.

The responsibility falls to this Court to recognize the errors that the Solicitor General will not acknowledge, and to save the cities from the enormous fiscal burdens that will follow if the Ninth Circuit's erroneous decision stands undisturbed. A call for the views of the Solicitor General yields important input for this Court, but not dispositive guidance. See *Hillside Dairy Inc.* v. *Lyons*, 123 S. Ct. 818 (2003) (granting certiorari in case in which SG had recommended denial); *Pharmaceutical Research & Mfrs. of America* v. *Walsh*, 123 S. Ct. 1855 (2003) (merits decision after grant after SG had recommended denial); *Rush Prudential HMO, Inc.* v. *Moran*, 536 U.S. 355 (2002) (same); *Ragsdale* v. *Wolverine World Wide, Inc.*, 535 U.S. 81 (2002) (same); *Wisconsin Dep't of Health & Family Servs.* v. *Blumer*, 534 U.S. 473 (2002) (same); *Owasso Indep. Sch. Dist.* v. *Falvo*, 534 U.S. 426 (2002) (same); *J.E.M. Ag Supply, Inc.* v. *Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124 (2001) (same). The Solicitor General's recommendation of denial here should be viewed especially skeptically, in light of the fact that the Department of Justice had already committed to a position below, and in light of the errors in the Solicitor General's analysis and the inconsistency of his position with earlier pronouncements of the federal government.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, amicus briefs, and reply brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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In The
Supreme Court of the United States

CITY OF SACRAMENTO and MIKE KASHIWAGI,
Director of the Department of Public Works of the
City of Sacramento, in his Official Capacity,

Petitioners,

v.

JOAN BARDEN, et al.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

BRIEF OF NATIONAL ASSOCIATION OF COUNTIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES AND INDIVIDUAL COUNTIES *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI OF PETITIONERS CITY OF SACRAMENTO, ET AL.

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INTEREST OF THE *AMICI CURIAE*[*]

The National Association of Counties (NACo) was created in 1935, when county officials desired a strong voice in the nation's capital. More than six decades later, NACo continues to ensure that the nation's 3,066 counties are heard and understood in the White House and the halls of Congress. NACo's membership totals more than 2,000 counties, representing over 80 percent of the nation's population. NACo has determined that this case is a significant matter affecting counties nationwide.

The California State Association of Counties (CSAC) is a non-profit corporation. Its membership consists of all 58 California Counties in the state. CSAC sponsors a Litigation Coordination program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties within California. The following California counties, individually, have also determined that this case is a matter of extreme importance and have thus joined in the submission of this brief: Butte, Colusa, Contra Costa, Glenn, Humboldt, Kings, Lake, Marin, Merced, Modoc, Monterey, Napa, Nevada, Placer, Plumas, Santa Cruz, Shasta, Sierra, Siskiyou, Tuolumne and Ventura.

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[*] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

Davidson County, Tennessee, and the County of Denver, Colorado, also support this brief.

SUMMARY OF THE ARGUMENT

The Ninth Circuit's decision significantly undermines Title II's[1] statutory and regulatory framework – a framework that heretofore has carefully balanced the competing policy concerns animating program accessibility jurisprudence: (1) achievement of optimum accessibility for services, programs, and activities administered by state and local governments; and (2) effective management of finite state and local government resources. Certain features of Title II's Program Accessibility regulations are direct responses to these policy concerns. The two-tiered access requirement structure, undue burden defense, and transition plan are critical components of the Justice Department's Program Accessibility regulations. These regulations reflect Congress's recognition that it would be economically catastrophic to require immediate, simultaneous retrofitting of the nation's public infrastructure in order to provide universal access to persons with disabilities, and that the most practical and fiscally responsible approach to achieving the policy aims of the ADA is through gradual, incremental implementation.

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[1] Title II of the Americans with Disabilities Act ("ADA") is an extension of the Rehabilitation Act of 1973, which prohibits discrimination against individuals with disabilities in federally assisted programs. Title II applies to public entities, excluding most non-federal government entities. Title II defines "public entities" as "any State or local government; and . . . the National Railroad Passenger Corporation, and any commuter authority (as defined in § 103(8) of the Rail Passenger Service Act, 45 U.S.C. § 502(8))." ADA § 201(1), 42 U.S.C. § 12131(1).

The Ninth Circuit's opinion, however, eviscerates this framework in holding that the ADA and the Rehabilitation Act cover "anything a public entity does" so long as it is a "normal function of a governmental entity." Now, according to the Ninth Circuit's opinion, every part of a municipality's infrastructure is potentially a "program, service, or activity" that must be made immediately compliant with the ADA – a pronouncement directly at odds with the ADA's program accessibility framework. The deleterious effect of the Ninth Circuit's opinion is also compounded by the opinion's analytical shortcomings. Not only does the Ninth Circuit's opinion fail to analyze the critical issue of whether existing sidewalks are a program, service, or activity under Title II of the ADA, but it also disregards the enormous financial burden to be placed on local governments throughout the Ninth Circuit by requiring immediate retrofitting of entire public infrastructure systems. The Ninth Circuit's decision also raises significant implementation issues that impact greatly on the budgets of local governments. Congress did not intend for such results. Therefore, this Court should grant the petition for a writ of certiorari to: (1) restore order to Title II's budget-sensitive Program Accessibility framework; (2) establish a workable, analytical guide for judicial treatment of coverage questions under Title II; (3) address the implementation issues raised by the Ninth Circuit's opinion; and (4) declare that the policy aims of the ADA, with regard to existing facilities, are best achieved through gradual, incremental implementation.

ARGUMENT

A. The Statutory and Regulatory Framework of the ADA and the Rehabilitation Act

Congress passed the ADA in 1992 to address discrimination against persons with disabilities. The ADA

addresses discrimination in employment (Title I), in public services and public transportation (Title II), and in public accommodations (Title III). 42 U.S.C. §§ 12111-12189; *see PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001).

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Congress did not set forth the specific obligations of public entities in this section, but rather directed the Justice Department to issue regulations to implement the provisions of Title II. 42 U.S.C. § 12134(a). Among other things, Congress directed that the regulations be consistent with the provisions of Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination against disabled persons by any program receiving federal financial assistance. 42 U.S.C. § 12134(b). With regard to program accessibility in existing facilities, Congress directed that the regulations be consistent with Section 504 regulations for federally-conducted activities. *See* 28 C.F.R. pt. 39.

In accordance with Congressional mandate, the Department of Justice promulgated "program accessibility" regulations that require that no disabled person shall be denied the benefits of or participation in any program, service, or activity "because a public entity's facilities are inaccessible to or unusable by persons with disabilities." *Id.* at § 35.149. The Department of Justice defined the term "facility" to include any place where a program, service, or activity is offered. *Id.* at § 35.104. The Program Accessibility regulations also maintained the two-tiered

approach to facility accessibility established in Rehabilitation Act regulations. This two-tiered system distinguishes between a public entity's duties with respect to "existing facilities" (*id.* at § 35.150) as opposed to "new construction or alterations." *Id.* at § 35.151.

With regard to existing facilities, the regulations do *not* require public entities to immediately retrofit all existing facilities to provide access to persons with disabilities. Instead, the regulations require only that public entities operate all programs, services and activities in such a way that when viewed in its entirety, each service or program is "readily accessible to and usable by individuals with disabilities. . . . " *Id.* at § 35.150(a). Additionally, the regulations provide that a public entity need not take any action if it can demonstrate that doing so "would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." *Id.* at § 35.150(a)(3). The regulations also set forth a transition plan, whereby certain public entities, within six months of January 26, 1992, must: (1) identify the physical obstacles that limit the accessibility of its programs or activities with disabilities; (2) describe its rectification methods; and (3) specify a schedule for achieving compliance. *See id.* at § 35.150(d). By contrast, the regulations governing "new construction or alterations" are more stringent; neither the undue burden defense nor the transition plan is available under the new construction regulations. *Id.*

B. The Proceedings Below

This case was filed by several mobility and vision impaired individuals, on behalf of themselves and others

similarly situated against the City of Sacramento (City). Respondents here alleged that the City violated the terms of the ADA and Rehabilitation Act by failing to install curb cuts in newly constructed sidewalks and by failing to ensure program access to public rights-of-way.

The parties filed motions for summary judgment and summary adjudication on the question of whether sidewalks themselves are covered by the program access requirements of the ADA and Rehabilitation Act. The district court denied Respondents' summary judgment motion and granted in part the City's partial motion for summary judgment. In its order, the district court found that sidewalks were not a program, service, or activity of the City of Sacramento, and thus are not subject to the program access requirements of the ADA or Section 504 of the Rehabilitation Act. The district court certified its order for interlocutory appeal under 28 U.S.C. § 1292(b).

On appeal, the Ninth Circuit reversed the district court, holding that it was unnecessary to split hairs to determine whether particular functions, such as sidewalks, are a program, service or activity under the ADA. *Barden v. City of Sacramento*, 292 F.3d 1073 (9th Cir. 2002). Instead, the Ninth Circuit held that Title II covers "anything a public entity does" and that the critical inquiry was "not so much * * * whether a particular public function can *technically* be characterized as a service, program or activity, but whether it is a "'normal function of a governmental entity.'" *Id.* at 1076 (quoting *Bay Area Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 731 (9th Cir. 1999).

The panel then held that "maintaining public sidewalks is a normal function of a city and "without a doubt

something that the [city] 'does.'" *Barden*, 292 F.3d at 736 (quoting *Hason v. Medical Bd. of Cal.*, 279 F.3d 1167, 1173 (9th Cir. 2002), *cert. granted*, 72 U.S.L.W. 3247 (Nov. 18, 2002) (No. 02-479)). Thus, the panel reasoned, "[m]aintaining their accessibility for individuals with disabilities therefore falls within the scope of Title II." *Barden*, 292 F.3d at 1076.

C. The Ninth Circuit's Opinion Eviscerates the Program Accessibility Framework

As mentioned above, when Congress passed the ADA it directed the Attorney General to issue regulations implementing the policy goals of the ADA within one year after its enactment. H. Rep. No. 485, 101st Cong., 2d Sess., pt.3, at 52 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 475. Congress directed the Attorney General to issue regulations consistent with the Rehabilitation Act of 1973, "except with respect to 'program accessibility, existing facilities' and 'communications,'" *Id.* For those excepted provisions, Congress specifically directed the Attorney General to issue regulations consistent with the regulations applicable to federally conducted activities under Section 504 of the Rehabilitation Act. *Id.*

Following Congressional direction, the Department of Justice promulgated the Program Accessibility regulations found at 28 C.F.R. §§ 35.149 *et seq.* These regulations mirrored the two-tiered accessibility provisions of the Rehabilitation Act, imposing certain requirements for "existing facilities" (*id.* at § 35.150) and different requirements for "new construction and alterations" of facilities (*id.* at § 35.151). In its Section-By-Section Analysis of the Program Accessibility, Existing Facilities regulations, the

Department of Justice explained the practical reason for the distinction:

> Consistent with section 204(b) of the Act, this regulation adopts the program accessibility concept found in the section 504 regulations for federally conducted programs or activities (e.g., 28 C.F.R. part 39). The concept of "program accessibility" was first used in the section 504 regulations adopted by the Department of Health, Education, and Welfare for its federally assisted programs and activities in 1977. It allowed recipients to make their federally assisted programs and activities available to individuals with disabilities without extensive retrofitting of their existing buildings and facilities, by offering those programs through alternative methods. *Program accessibility has proven to be a useful approach and was adopted in the regulations issued for programs and activities conducted by Federal Executive agencies. The Act provides that the concept of program access will continue to apply with respect to facilities now in existence, because the cost of retrofitting existing facilities is often prohibitive.*

28 C.F.R. Part 35, App. A, at 534 (emphasis added).

Further on in its analysis, the Department of Justice explained that "Section 35.150 requires that each service, program or activity conducted by a public entity, when viewed in its entirety, be readily accessible to and usable by individuals with disabilities. *The regulation makes clear, however, that a public entity is not required to make*

each of its existing facilities accessible (§ 35.150(a)(1))." *Id.* (emphasis added).[2]

As the legislative and regulatory history demonstrates, Congress and the Department of Justice were cognizant of the tremendous financial burden that would be placed upon municipalities if extensive retrofitting were required under the regulations. Thus, the Department of Justice in issuing the regulations, maintained the two-tiered system used in the Rehabilitation Act as part of a deliberate effort to avoid imposing harsh financial burdens on state and local governments. In fact, this "prohibitive cost avoidance" principle animates all of the Program Accessibility, Existing Facilities regulations.

For example, the undue burden defense, which provides that public entities need not take any action that they can demonstrate would result "in undue financial or administrative burdens," is only available for existing facilities. The availability of this defense is part of Congress's recognition that extensive retrofitting of existing facilities is much too onerous a burden for local municipalities.[3] The transition plan too, is also part of an overall

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[2] "With limited exceptions, the regulations do not require public entities to retrofit existing facilities immediately and completely. Rather, a flexible concept of accessibility is employed, and entities are generally excused from making fundamental alterations to existing programs and bearing undue financial burdens." *Kinney v. Yerusalim*, 9 F.3d 1067, 1071 (3d Cir. 1993).

[3] "[T]here are logical reasons for the distinction between existing and new or altered facilities. Allowance of an undue burden defense for existing facilities serves as recognition that modification of such facilities may impose extraordinary costs. New construction and alterations, however, present an immediate opportunity to provide full accessibility." *Kinney v. Yerusalim*, 9 F.3d 1067, 1074 (3d Cir. 1993).

"prohibitive cost avoidance" theory found throughout the Program Accessibility regulations and the ADA itself. *See id.* at § 35.150(d).

The Ninth Circuit's opinion completely undermines the Program Accessibility framework. In its opinion, the Ninth Circuit simply stated that "[a]ttempting to distinguish which public functions are services, programs, or activities, and which are not, would disintegrate into needless 'hair-splitting arguments.'" *Barden*, 292 F.3d at 1076 (quoting *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37 (2d Cir. 1997)). "Rather than determining whether each function of a city can be characterized as a service, program, or activity for purposes of Title II, we have construed 'the ADA's broad language [as] bring[ing] within its scope anything a public entity does." The panel continued, "The focus of the inquiry * * * is whether [a particular function] is a 'normal function of a government entity.'" *Barden*, 292 F.3d at 1076 (quoting *Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 731 (9th Cir. 1999)).

By creating and applying its overly-broad "normal function" test, the Ninth Circuit destroyed three significant aspects of program accessibility jurisprudence. First, the Ninth Circuit's decision destroyed the Congressionally-mandated division between existing and new facilities. Now, under the Ninth Circuit's reasoning, any piece of property maintained by a public entity is a program, service, or activity under the ADA and must be made immediately accessible to persons with disabilities. This means that existing facilities are to be held to the same stringent requirements placed on newly constructed or altered facilities, without difference. Such a result clearly flies in the face of expressed Congressional intent and the

regulations promulgated consistent with that intent, as discussed above. If Congress desired a "normal function" test to obliterate the line between existing and new facilities, why did it specifically direct the Department of Justice to impose regulations maintaining the two-tiered system in the first instance? *See* H. Rep. No. 485, 101st Cong., 2d Sess., pt. 3, at 52 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 475.

Second, the Ninth Circuit's opinion destroyed the deliberate timing features of the Program Accessibility regulations. As mentioned above, the Program Accessibility regulations provide that certain municipalities[4] must, within six months of January 26, 1992, develop a transition plan to: (1) identify the physical obstacles that limit the accessibility of its programs or activities with disabilities; (2) describe its rectification methods; and (3) specify a schedule for achieving compliance. *See id.* at § 35.150(d).

By providing for the creation of a transition plan, the Department of Justice left the "*how to*" in the hands of the local governments. The Department of Justice explicitly recognized that the local governments, cities and counties are in the best position to determine when and how changes can be made to existing facilities to provide universal access to persons with disabilities. Since the ADA's passage, countless local governments have assuredly spent thousands of hours agonizing over budgets, project plans, and construction bids in an effort to fulfill the goals of the ADA. However, in one fell swoop, the

[4] Only public entities employing 50 or more persons are required to develop transition plans. *See* 28 C.F.R. § 35.151(d)(1).

Ninth Circuit has eliminated all existing transition plans. Under the "normal function" test, the Ninth Circuit's opinion effectively and immediately nullified the transition plan for every county and municipality within its jurisdiction. Because local governments must make their programs, services, and activities immediately accessible, and because every facility maintained by a public entity is now conceivably a program, service, or activity, state and local governments within the Ninth Circuit are now prohibited from implementing gradual changes to existing facilities as Congress intended, even if the facility is otherwise not essential to providing access to a "legitimate" program, service or activity.

Finally, the Ninth Circuit's opinion does away with the budget-sensitive provisions of the Program Accessibility regulations, subjecting local municipalities to incalculable economic burdens. By holding that the ADA covers "anything a public entity does" so long as it is a "normal government function," the Ninth Circuit's opinion requires public entities to immediately retrofit existing facilities to make them ADA-compliant. Because the opinion erased the line between existing and new facilities and eliminated the transition plan, public entities must now scramble to make all of their existing facilities immediately ADA-compliant. Aside from the fact that Congress never intended this result, the Ninth Circuit's opinion would have an extraordinarily costly effect, a fact the Ninth Circuit's opinion blithely ignores.

As noted in Petitioners' brief, one estimate of the cost of sidewalk construction is $36,000 per mile. See www.commuterservices.com/costs.htm. There are also 450,000 miles of

roads within the Ninth Circuit. See www.fhwa.dot.gov/ohim/1994/section5/hm-14.pdf. Assuming that the number of sidewalk miles is close to the number of road miles, the potential estimated cost of a circuit-wide sidewalk retrofit could easily exceed $16,200,000,000. While these figures are necessarily guesswork, the point is otherwise clear – requiring local governments to immediately retrofit hundreds of existing sidewalks is an extremely costly proposition. This does not even take into account the costs associated with immediate retrofitting of other existing pieces of municipal infrastructure. Under the Ninth Circuit's opinion, local municipalities may now be required to make their roads, bridges and streets immediately ADA-compliant and at great costs.

The Ninth Circuit's opinion did much to dismantle a carefully constructed accessibility program – a program crafted in accordance with Congressional intent and implemented through Justice Department regulations. The statutes and regulations comprising the accessibility program were drafted with an understanding of the limited resources of municipal governments and an intent not to subject these local public agencies to undue financial burden. These provisions, and their underlying intent, are nullified under the Ninth Circuit's "normal function" test. This Court should grant the petition for a writ of certiorari to restore order to Title II's budget-sensitive Program Accessibility framework.

D. The Ninth Circuit's Decision Is Analytically Flawed

The Ninth Circuit's opinion contains analytical missteps that are detrimental to consistent application of the

ADA's statutes and regulations. This Court should also establish a workable, analytical guide for judicial treatment of coverage questions under Title II.

In *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206 (1998), this Court was asked to decide whether a motivational boot camp, part of the Pennsylvania state prison system, was a program, service, or activity under the ADA. In holding that the motivational boot camp was a program under the ADA, this Court carefully analyzed whether the challenged function was covered under the plain terms of the regulations. *Id.* at 212. *Yeskey* established that whenever a challenge has been made regarding whether a particular public function is a program, service or activity under the ADA, barring an ambiguous provision, the district court must perform a term-by-term analysis to determine if the challenged function is actually a program, service, or activity. *Id.*

The Ninth Circuit refused to follow *Yeskey*. The panel refused to analyze whether a sidewalk is actually a "program, service or activity" under the ADA. Instead, the Ninth Circuit held that Title II applies to "anything a public entity does," so long as it is a "normal function of a governmental entity." *Barden*, 292 F.3d at 1076. The Ninth Circuit's approach to this coverage question is distinctly different from this Court's directive in *Yeskey*. Where this Court has focused its inquiry in these types of cases narrowly and deliberately, by comparing the challenged function with the operative statutory language, the Ninth Circuit cast its net wide, holding that Title II covers "anything a public entity does" or has.

If this Court agrees that the Ninth Circuit incorrectly analyzed the coverage question herein appealed, the

opinion provides this Court with a great opportunity to establish the analytical approach that should have been taken and what should be followed by the district courts in the future when faced with a program coverage challenge under Title II. The Ninth Circuit's opinion also offers this Court a significant opportunity to expound upon the meaning and scope of *Yeskey*.

If this Court determines that the Ninth Circuit was correct in its analysis, this case still provides the Court with an excellent opportunity to more fully explain how the "normal function" test applies in program coverage questions under Title II. For example, the question before the district court below was whether sidewalks are programs, services, or activities under Title II. The same question was before the Ninth Circuit panel. The Ninth Circuit, glossing over the fact that a sidewalk cannot be something that someone does, held that "maintenance" of a sidewalk *is* something that a "public entity does" and therefore sidewalks are covered under Title II. By placing the word "maintaining" in front of any municipally-owned item, anything can become a program, service or activity under the ADA. Certainly, such a possibility is not what Congress intended. The Court's guidance is definitely needed to alleviate the confusion created by the Ninth Circuit opinion and its "normal function" test.

E. Implementation Issues

The Ninth Circuit's opinion raises several implementation issues. Set forth below are examples of how the Ninth Circuit's opinion creates or fails to address several, practical implementation issues.

1. Cost Allocation

The impediments to accessibility are oftentimes controlled by entities other than the local government (i.e., transit authorities, electrical companies, newspaper corporations, etc.). The panel's decision does not provide any guidance regarding how local governments should logistically coordinate with the various other entities contributing to the obstacle complained of. For example, how are local governments to allocate costs between themselves and the contributing entity? The Ninth Circuit's opinion creates real logistical concerns.

2. The Scope and Reach of the Normal Function Test

As discussed above, the panel's holding means that every piece of a local government's infrastructure is a program, service or activity under the ADA. The Ninth Circuit's decision does not address the outer boundary of its test. For example, can the panel's opinion be read to require that local governments must now build new infrastructure where none existed previously? There are numerous dirt, gravel and otherwise unpaved roads within the Ninth Circuit. To the extent that these roads are inaccessible to persons with disabilities, does the Ninth Circuit's holding require that the local governments build new roads and accompanying sidewalks, despite the fact that the local government had not expended any funds at or near the questioned area and the road and sidewalks are not needed for access to any covered program?

3. Transition

As previously addressed, the Ninth Circuit's opinion undermines the timing and transition features intended by Congress and regulated by the Justice Department. Local governments within the Ninth Circuit now must make existing sidewalks immediately compliant. However, the panel's decision does not offer any guidance on how local government should order their priorities. For example, how are local governments to determine which sidewalks (or other pieces of infrastructure) must be addressed first? Additionally, must local governments self-assess, or will assessment be performed by an outside party? Finally, if immediate, universal access is required, is a local government in constant violation of the ADA until all adjustments are made?

This Court should make a formal pronouncement regarding the preferred method of retrofitting existing infrastructure. Certainly, the Ninth Circuit's approach to retrofits of existing infrastructure is completely unworkable. Every municipality within the Ninth Circuit is now placed under considerable financial burdens to immediately retrofit all of their existing sidewalks (or other facilities). This case represents an opportunity for this Court to give judicial voice to Congress's intent as regards program accessibility and existing facilities. With this opportunity, the Court could, once and for all, declare that gradual implementation of ADA's policy aims is the best approach to realizing: (1) achievement of optimum accessibility for services, programs, and activities administered by state and local governments; and (2) effective management of finite state and local government resources.

CONCLUSION

The Ninth Circuit's opinion has destroyed the carefully drafted framework of the Americans with Disabilities Act. The Ninth Circuit's opinion also has subjected municipalities throughout its jurisdiction to potentially staggering financial burdens. This Court's guidance is needed to restore order to Title II's budget-sensitive Program Accessibility framework, to establish a workable, analytical guide for judicial treatment of coverage questions under Title II; and to declare that the policy aims of the ADA, as regards existing facilities, are best achieved through gradual, incremental implementation. Accordingly, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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